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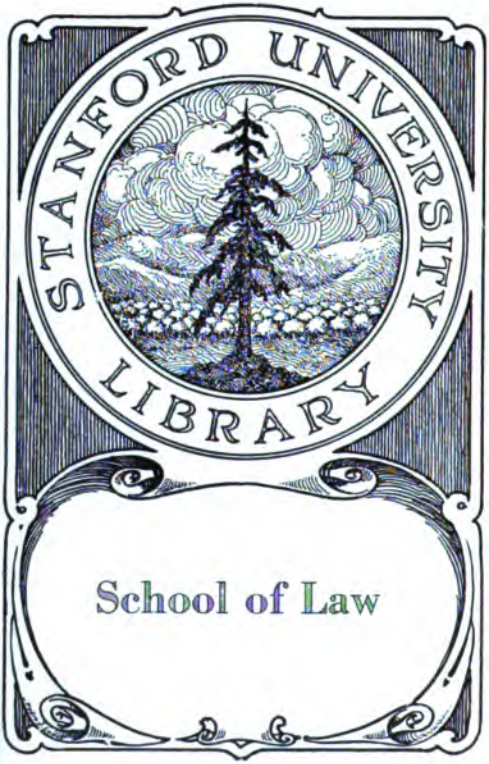
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THE

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POWERS OF SALE IN MORTGAGES.

FOR some time after powers of sale were first introduced into mortgages they were looked upon as a dangerous innovation, giving to mortgagees an extraordinary power, liable to be oppressively used, and even their validity was seriously questioned (*a*). Even after their validity had been affirmed by judicial decision, and conveyancers' practice had introduced them as a common form, it was held that trustees, or others acting under a delegated power, could not, although authorized to make a mortgage, insert a power of sale therein without a special authority so to do (*b*). The utility of the power, both in the ready means which it offers to mortgagees for a speedy realization of their claims and in the consequently increased facility for borrowing which it affords to mortgagors, has firmly established it in favour, and it is now inserted in mortgages settled by the Court on behalf of infants (*c*), and may without any express authority be inserted by trustees and others in mortgages which they are authorized to make (*d*).

If any further evidence were required as to the propriety of this power, it would be furnished by the various legislative enactments providing that it shall be an implied

(*a*) 1 Powell on Mortgages (6th Ed.), 10 *et seq.*

(*b*) *Clarke* v. *Panopticon*, 4 Drew. 26. But see *Bridges* v. *Longman*, 24 Beav. 27, 29.

(*c*) *Selby* v. *Cooling*, 23 Beav. 418.

(*d*) *Re Chawner*, L. R. 8 Eq. 569, *Cruickshank* v. *Duffin*, L. R. 13 Eq. 555

power incident to mortgages in which an express power is not inserted (*e*).

I. Notice of Sale.

When required.—Usually it is provided that the power shall be exercised only after the giving of a certain notice to a person or persons indicated in the power itself, and in all such cases it is sufficient and necessary that notice be given in the particular mode and to the particular persons so pointed out, and no further or other notice can be required (*f*).

If the form of the power expressly authorizes a sale without any notice, the express agreement of the parties will of course govern the matter, and neither the mortgagor nor any one claiming under him will be entitled to any notice of intention to exercise the power.

If it be provided that the power shall be exercised upon notice, but no length of time is specified, the notice must be one which under all the circumstances is reasonable (*g*).

Form of notice.—In the absence of any special provision in the power, the notice should show upon its face that it is given pursuant to and in exercise of the power (*h*); it should name or identify the person who proposes to sell (*i*), and should be signed by him or on his behalf (*j*); but it need not name the owner of the equity of redemption or the persons who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued (*k*), although it is usual for it to do so where the persons so

(*e*) See 42 Vict. (Ont.) cap. 20, providing that a power of sale shall be an implied power in mortgages which do not contain an express power. In England, it is provided for by the Conveyancing Act of 1881, and there are statutory provisions on the subject in many States of the American Union.

(*f*) *Princeton Loan and Trust Co.* v. *Munson*, 60 Ill. 371; *Dyer* v. *Shurtleff*, 112 Mass. 165.

(*g*) *Massey* v. *Sladen*, L. R. 4 Ex. 13.

(*h*) *Judd* v. *O'Brien*, 21 N. Y. 186.

(*i*) *Roche* v. *Farnsworth*, 106 Mass. 509. But see contra, *Fitzpatrick* v. *Fitzpatrick*, 6 R. I. Rep. 64, and *Bridenbecker* v. *Prescott*, 3 Hun (N. Y.) 419.

(*j*) *Roche* v. *Farnsworth*, 106 Mass. 509.

(*k*) *Dyer* v. *Shurtleff*, 112 Mass. 165; *Learned* v. *Foster*, 117 Mass. 365.

interested are known to the persons giving the notice; this fact becomes important where the mortgagee has a power to sell upon giving notice by publication, or by posting on the premises, or by any means other than actual personal service (*l*); it should show that default has been made in the condition, so that the power arises (*m*), and should specify the property proposed to be sold (*n*). A notice stating that unless payment be made the mortgagee will "institute legal proceedings to gain possession" is not such a notice as will authorize a sale (*o*); but a notice which is otherwise sufficient will not be invalidated by the mere fact that it demands payment of a larger sum than that which is actually due upon the mortgage. If, however, it should afterwards be shown that by reason of the publication of a notice claiming more than was actually due bidders were deterred from attending the sale, or that the property was otherwise injuriously affected, or that the claim was made for any fraudulent purpose, such fact might furnish a reason for setting aside the sale (*p*).

Where there are several mortgages upon distinct parcels of land, having the same parties and in every way alike except as to the amount secured, it is proper to give separate notices of sale under each of the mortgages (*q*).

Service on persons under disability.—The notice should be served upon the persons indicated in the power, and service upon such persons will be sufficient, notwithstanding that such persons are under disability. Thus service is valid although effected on a lunatic (*r*), or an infant (*s*); such

(*l*) By the English Conveyancing Act of 1881, sec. 67, it is provided that the notice shall be sufficient although only addressed to the mortgagor by that designation without his name; or generally to the persons interested without any name, notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained.

(*m*) *Bush* v. *Sherman*, 80 Ill. 160. But see contra *Model Lodging House Association* v. *City of Boston*, 114 Mass. 133, and *King* v. *Bronson*, 122 Mass. 122.

(*n*) *Roche* v. *Farnsworth*, 106 Mass. 509.

(*o*) *Bartlett* v. *Jull*, 28 Gr. 140.

(*p*) *Hamilton* v. *Lubukee*, 51 Ill. 415; *Block* v. *Cronkhite*, 1 Hill (N. Y.), 107.

(*q*) *Marsh* v. *Morton*, 75 Ill. 621.

(*r*) *Mellersh* v. *Keen*, 27 Beav. 236; *Robertson* v. *Lockie*, 15 Sim. 285.

(*s*) *Bartlett* v. *Jull*, 28 Gr. 140; *Tracey* v. *Lawrence*, 2 Drew. 403 *Woods* v. *Hyde*, 10 W. R. 339.

notice may be served upon the infant and his guardian (*t*), or upon the infant himself, by leaving it in his own hand, no matter how young he may be (*u*), or apparently by serving on the guardian alone a notice addressed to the infant (*v*). It matters not whether the guardian be one appointed by the Court (*w*), or be the guardian in socage (*x*); and doubtless service upon a testamentary guardian would be equally efficacious.

Notice to mortgagor, his executors, administrators, or assigns.—Where a mortgage contained a power to sell upon notice to "the mortgagor, his executors, administrators, *or* assigns," a subsequent mortgagee was held to be entitled to notice as an assign, notwithstanding that the mortgagor was still living, and had been duly served with notice, and notwithstanding that the classes of persons to be served were connected by a disjunctive instead of a copulative conjunction; and it was treated as an open question, whether it would have been necessary to serve notice on the mortgagor if notice had been served on the assignee (*y*).

It was held in another case, where the power required notice to the mortgagor, "his heirs, executors, *or* administrators," that notice must be given to the mortgagor if alive, and, if not, then to his heirs *and* personal representatives, on the ground that there was no disjunctive between the heirs and the personal representatives; but that the disjunctive used had reference only to the different classes of personal representatives (*z*).

Service at usual or last place of residence.—Where the power made provision for service on the mortgagor, "either personally, or at his usual or last place of residence within the Province," it was held by Proudfoot, J., that service in such case could not be made at the usual or last place of

(*t*) See cases cited in last note.
(*u*) *Bartlett* v. *Full*, 28 Gr. 140, and see *Woods* v. *Hyde*, 10 W. R. 339.
(*v*) *Bartlett* v. *Full*, 28 Gr. 140.
(*w*) *Tracey* v. *Lawrence*, 2 Drew. 403.
(*x*) *Bartlett* v. *Full*, 28 Gr. 140.
(*y*) *Hoole* v. *Smith*, 17 Chy. D. 434.
(*z*) *Bartlett* v. *Full*, 28 Gr. 140.

residence unless it appeared that the mortgagor was out of the Province at the time of the service; but this decision was reversed by the Divisional Court, which held that the service might be made either at the mortgagor's usual place of residence within the Province, where he still resided within the Province, or it might be made at his last place of residence within the Province, where at the time of such service he resided without the Province (*a*); the decision of the Divisional Court in this case was affirmed by the Court of Appeal, but upon a ground which did not involve the necessity of putting a construction upon the clause in question (*b*).

Service on mortgagor, his heirs, executors, administrators, and assigns.—Where the power provides that notice may be served on the mortgagor, his heirs, executors, administrators and assigns, or left at his or their usual, or last known place of abode, it is *prima facie* sufficient if notice be posted on the door of the last known residence of the mortgagor, and it is not necessary to show that he was then alive, as the presumption is that life continues, and the onus lies on those who question the validity of the sale to show that anything more should have been done (*c*).

Service on execution creditors.—Although it is the usual practice of the profession to serve notice upon the execution creditors of the mortgagor having their writs in the hands of the sheriff, it is doubtful whether it is necessary to effect such service in cases where the power requires service to be made upon the mortgagor, his heirs and assigns; the doubt being whether such an execution creditor is an assign by operation of law. Doubtless, a purchaser at a sale had under such an execution would be an assign within the meaning of the statute.

Can period of default run concurrently with period of notice.—Where the provision is that the power may be

(*a*) *O'Donohoe* v. *Whitty*, 2 Ont. Rep. 424. The form of the power in this case followed that given in the Ontario Short Forms of Mortgage Act, R. S. O. cap. 104.

(*b*) 4 C. L. T. 203.

(*c*) *Major* v. *Ward*, 5 Hare 598.

exercised after default in payment for one month, and one month's notice of sale, the periods of default and of notice cannot run concurrently (*d*); but in a case where the power of sale was to arise after three months' default without notice, and the mortgagee covenanted with the mortgagor not to exercise the power without one month's notice, it was held that the period of default and the period of notice could run concurrently (*e*).

Where the power required six months' notice, and a notice was served after the day on which the notice bore date, saying that in default of payment the property would be sold in six months from the date of the notice, it was held that such a notice was substantially sufficient, as the sale did not in fact take place until after the lapse of six months from the date of service (*f*).

Waiver of notice.—Where a mortgagor has given a mortgage with a power of sale to be exercised after notice to himself, and has then mortgaged or conveyed away his equity of redemption, he cannot afterwards, by any arrangement with the mortgagee, so waive his right to notice as to enable the mortgagee to exercise the power without notice, for the rights of third parties have in the mean time intervened, and they are entitled to enforce a strict compliance with the terms of the power as it stood at the date when their respective interests arose (*g*).

A mortgagee on the other hand, may waive any default on the part of the mortgagor, and waive any notice given by himself in exercise of the provisions of the power, and in such a case a new notice will be necessary before a sale can be made (*h*), but a mere waiver of a notice already given would not amount to a waiver of the default in respect of which the notice was given, and a new notice might immediately be given in respect of the old default; but if the default itself be waived, no sale can be had until a new default occurs and until notice be given in respect of that default.

(*d*) *Gibbons* v. *McDougall*, 26 Gr. 214.
(*e*) *Grant* v. *Canada Life Assurance Co.*, 29 Gr. 256.
(*f*) *Metters* v. *Brown*, 9 Jur. N. S. 958.
(*g*) *Foster* v. *Hoggart*, 15 Q. B. 155.
(*h*) *Tommey* v. *White*, 3 H. L. C. 168

Damages for sale without notice.—Where a mortgagee wrongfully sold the mortgaged premises without notice, although he did not sell them at an undervalue, in an action for damages brought against him by the mortgagor, it was held by Mr. Justice Fry that the mortgagor was entitled to damages made up, *firstly*, of such costs as he had been put to by reason of the sale so made without his knowledge; *secondly*, of a sum estimated to cover the cost of investing the purchase money of the mortgaged premises in a new property similar to that sold, and, *thirdly*, of the plaintiff's solicitor and client costs in the action in addition to his costs therein as between party and party (*i*). This came up on appeal, however, before the Court of Appeal (*j*), when that Court varied the judgment of the Court below by disallowing the solicitor and client costs which had been allowed as damages; and they further disallowed the damages which had been given as the cost of re-investment, on the ground that the mortgagor could be entitled to no sum for re-investment, as the whole amount of the purchase money was all required to pay the sum due upon the mortgage.

So also where a subsequent mortgagee is entitled to notice, which notice is, in fact, not served on him, he may maintain an action for damages against the mortgagee for wrongfully effecting a sale without notice (*k*). It is submitted, however, that damages could be recovered in the event only of the sale being effective notwithstanding the want of notice and not where the want of notice renders the sale void or voidable.

II. Position and Duty of a Mortgagee.

Is trustee in a limited sense only.—Vice-Chancellor Stuart thus defines the position and duty of a mortgagee acting under a power of sale in his mortgage (*l*):—"Lord Eldon says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression

(*i*) *Cockburn* v. *Edwards*, 16 Chy. D. 393.
(*j*) *Cockburn* v. *Edwards*, 18 Chy. D. 449.
(*k*) *Hoole* v. *Smith*, 17 Chy. D. 434.
(*l*) *Robertson* v. *Norris*, 1 Giff. 422.

is to be understood in this sense, that the power being given to enable him to recover the mortgage money, this court requires that he shall exercise the power of sale in a provident way with due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage money, if he uses the power for another purpose—from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals—the Court considers that to be a fraud in the exercise of the power because it is using the power for purposes foreign to that for which it was intended."

It is in a limited sense only that the mortgagee can be said to be a trustee for the mortgagor; their relative rights are not to be decided upon the law respecting trustee and *cestui que trust* (*m*), and the only sense in which the mortgagee can be said to be a trustee for the mortgagor, even in a case where the mortgage takes the form of a trust for sale, is with respect to the balance of purchase money or surplus after a sale (*n*).

Mortgagee must act reasonably.—"A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion, not to throw away the property, but to act in a prudent and business like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable" (*o*).

If a mortgagee seeks to promote the common welfare of the parties interested, and keeps within the scope of his authority, a Court of Equity will not hold him responsible

(*m*) *Watkins* v. *McKellar*, 7 Gr. 584. But see *Richmond* v. *Evans*, 8 Gr. 508.

(*n*) *Warner* v. *Jacob*, 20 Chy. D. 220; *Martinson* v. *Clowes*, 21 Chy. D. 857.

(*o*) *Per* V. C. Knight Bruce, in *Matthie* v. *Edwards*, 2 Coll. 480. This case was subsequently reversed on appeal (16 L. J. Chy. N. S. 405), but the law as given in the passage above cited was not thereby in any way affected.

for mere errors of judgment, or for results, however unfortunate, which he could not reasonably have anticipated (*p*).

If he exercises his power openly, fairly, and in compliance with its terms, it is no objection to the validity of the sale that a greater price might have been obtained by waiting till a more favourable time (*q*), for the mortgagee is under no obligation to speculate or wait till another time for a better offer (*r*), even though the time when the property is offered be not the most advantageous period of the year (*s*).

Although it is the duty of the mortgagee to promote competition, the fact that he has not sought a higher offer from one of two persons professing to purchase by private contract, before closing with the rival bidder, is not a ground for setting aside or cancelling the contract (*t*); and if the mortgagee exercise his power of sale *bona fide* for the purpose of realizing his debt, and without collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless the price be so low as in itself to be evidence of fraud (*u*).

Mere inadequacy of price taken by itself is not sufficient to invalidate a sale which is fairly conducted (*v*), unless the purchase money be so grossly inadequate as to indicate a want of reasonable discretion (*w*).

Subject to what has already been said, a mortgagee with a power of sale is bound to act with the same care, and the same prudence, and to use every effort which a prudent proprietor would use to have the sale conducted under circumstances of the greatest advantage (*x*). He must take every reasonable means of preventing a sacrifice of the

(*p*) *Markey* v. *Langley*, 92 U. S. Sup. Ct. 155.

(*q*) *Franklin* v. *Greene*, 2 Allan (Mass.) 519.

(*r*) *Davey* v. *Durrant*, 1 De G. & J. 535. This case was appealed to the House of Lords, but the appeal was not prosecuted, 9 H. L. C. 192.

(*s*) *Bedell* v. *McClellan*, 11 How. Pr. (N. Y.) 172.

(*t*) *Harper* v. *Hayes*, 2 De G. F. & J. 542.

(*u*) *Warner* v. *Jacob*, 20 Chy. D. 220.

(*v*) *Landrum* v. *Union Bank of Missouri*, 63 Mo. 48; *King* v. *Bronson*, 122 Mass. 122.

(*w*) *Horsey* v. *Hough*, 38 Md. 130.

(*x*) *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 303.

property. Therefore, where a mortgagee said that all he wanted was to get the money due him, and he would let the property go, and accordingly, without having advertised the property, he sold it for about half its value, the sale was set aside and the mortgagor allowed to redeem (*y*).

His duty as to advertising.—Where the mortgagee is authorized to sell by private contract he may accept a fair offer for the property although he has not previously advertised the property for sale (*z*); but where he is not authorized to sell by private contract, it is his duty to advertise the auction sale, and in default of his so doing the sale may be set aside. Even the attendance of the mortgagor himself at the auction sale and his bidding thereat will not waive any objection as to want of advertising (*a*).

Sale at instance of third persons.—It is not improper for the mortgagee to exercise his power at the request of some interested person and for the purpose of clearing up subsequent complications of title, but it might be otherwise if it were a part of the arrangement that the whole mortgage debt should be again lent to the purchaser upon the security of the same property (*b*).

May pursue his remedies concurrently.—It is the right of the mortgagor to pursue all his remedies concurrently (*c*), and it is usual and proper for him to take ejectment proceedings concurrently with his sale proceedings, so as to be in a position to deliver possession to the purchaser at the time of sale (*d*).

III. Persons by whom power may be exercised.

When given to mortgagee, can it be ever used by his assigns?—It is apparently open to question whether an assignment of a mortgage containing a power of sale in favour of the

(*y*) *Latch* v. *Furlong*, 12 Gr. 303.

(*z*) *Davey* v. *Durrant*, 1 De. G. & J. 535.

(*a*) *Richmond* v. *Evans*, 8 Gr. 508.

(*b*) Dart V. & P. (5th Ed.) 74 and 75.

(*c*) *Cockell* v. *Bacon*, 16 Beav. 158. But see now 47 Vict. (Ont.) cap. 16. See 4 C. L. T. 267, *et seq.*, for remarks on that statute.

(*d*) *Trust and Loan Co.* v. *McGillvray*, 7 P. R. 318.

mortgagee, but not mentioning his assigns, will transfer the power so that it may be exercised by the assignee. It was held in *Cooke* v. *Crawford* (*e*), that a trust for sale vested in A. and his heirs cannot be exercised by the assigns of A. But Jessel, M. R., in the recent case of *Osborne* v. *Rowlett* (*f*), reviewed the authorities upon the point, and held that *Cooke* v. *Crawford* must be considered as overruled. He apparently proceeded upon the broad ground that where there is a legal estate with a power annexed to it, that power devolves with the legal estate to which it is annexed, unless there is something peculiar to evince an intention that the power was not to be transmissible with the legal estate. This is a very satisfactory and intelligible rule, but it must be acted upon with caution, as doubt has been thrown upon the decision in that case by the Court of Appeal in *Re Morton* v. *Hallett* (*g*).

The legal representative of an assignee is himself an assign.—The legal representatives of an assignee are themselves assigns within the meaning of that term as used in a power given to the mortgagee and his assigns. Therefore, the administrator of the assignee of a mortgage, who has obtained a conveyance from the heir of such assignee to a trustee for himself can exercise a power of sale given by the mortgage deed to the original mortgagee, his heirs, executors, administrators, or assigns, with a direction that the receipts of the same persons shall be discharges (*h*).

Effect of sub-mortgage, change of terms, possession, etc.—Where the mortgagee with a power of sale has sub-mortgaged his security with a declaration that the sub-mortgagee may exercise the power of sale, it is doubtful whether the original mortgagee may himself afterwards exercise the power (*i*). Probably the sub-mortgagee may exercise the

(*e*) 13 Sim. 91, and see *Bradford* v. *Belfield*, 2 Sim. 264; *Wilson* v. *Bennett*, 5 De G. & S. 475; *McDonald* v. *Walker*, 14 Beav. 556; *Stevens* v. *Austen*, 7 Jur. N. S. 873.

(*f*) 13 Chy. D. 774.

(*g*) 15 Chy. D. 143.

(*h*) *Saloway* v. *Strawbridge*, 1 K. & J. 371, affirmed on appeal, 7 De G. M. and G 594.

(*i*) See *Cruse* v. *Nowell*, 2 Jur. N. S. 536.

power during the subsistence of his mortgage, and the original mortgagee may do so after discharge thereof and reconveyance of the estate.

In a case where a mortgage containing a power of sale was transferred with the benefit of all provisoes, etc., contained therein, and the mortgagor joined in the transfer and covenanted to pay a different sum on a different day, it was held that the power of sale still existed, and that a good title could be made thereunder (*j*).

The power may be exercised, notwithstanding that the mortgagee has been in possession for more than twenty years, because the mortgagee if he relied wholly on his possessory title would be required, and might be unable to prove that there had been no acknowledgment of the mortgagor's title during the time of the alleged adverse possession (*k*).

IV. Restraining Proposed Sale.

The exercise of a power of sale will not be restrained because the proposed sale is disadvantageous to the mortgagor unless the mortgagee is acting *mala fide* (*l*), nor will it be restrained to suit the convenience of the party moving, or to give him the control of the sale, or to wait for a rise in the market value of the property, or because the sale is proposed to be had at a season of the year when the property will not sell to the best advantage (*m*); for the mortgagee is not required to speculate or wait in order that a greater price may be obtained for the property, but he is entitled to realize upon his security as best he can at any time after default in payment and compliance with the terms of the power (*n*).

(*j*) *Young v. Roberts*, 15 Beav. 558, and see *Boyd* v. *Petrie*, L. R. 7 Chy. App. 385.

(*k*) *Re Alison*, 11 Chy. D. 284; *Chapman* v. *Corpe*, 41 L. T. 22; 27 W. R. 781.

(*l*) *Warner* v. *Jacob*, 20 Chy. D. 220.

(*m*) *Bedell* v. *McClellan*, 11 How. Pr. (N. Y.) 172.

(*n*) *Davey* v. *Durrant*, 1 De G. & J. 535 *Franklin* v. *Greene*, 2 Allan (Mass.) 519.

A stronger case must be made out in order to induce the Court to restrain a proposed sale (when there is only possibility of damage) than to set aside a sale after it has been improperly made (*o*).

Acting upon the maxim that he who seeks equity must do equity, the Court will not usually enjoin a sale unless the person seeking the aid of the Court pays or brings into Court at least what is admitted to be due upon the mortgage (*p*). In some American cases, however, relief has been granted to the plaintiff in such a case, but without costs, when he has failed to pay the amount due or to bring it into Court (*q*); but this will not usually be done; and while acting *bona fide* the mortgagee can usually be stopped only by payment or an actual tender of the principal, interest and costs; and the undertaking of counsel given upon an injunction motion that such a tender will be made is not sufficient (*r*).

The general rule as recognized by the English Courts is that the mortgagee cannot be stopped from selling the estate without the mortgagor first paying into Court or otherwise securing to him, not what the Court might think *prima facie* is due to him, as well as they can ascertain at the moment, but the whole amount which in good faith is claimed by the mortgagee. In case however of the relationship of solicitor and client existing between the mortgagor and mortgagee the Court will seize upon this circumstance as preventing the solicitor from exercising what would otherwise be his unqualified rights as mortgagee, and will stay the sale in a proper case upon payment into Court of such a sum as the Court considers equitable under the circumstances (*s*).

A proposed sale under a power in a mortgage has been restrained on the ground that a suit was pending to redeem

(*o*) *Kershaw* v. *Kalow*, 1 Jur. N. S. 974.

(*p*) *Vechte* v. *Brownwell*, 8 Paige (N. Y.) 212.

(*q*) *Sloan* v. *Coolbaugh*, 10 Iowa 31; *Powel* v. *Hamson*, 38 Md.; 1 *Meysenburg* v. *Schlieper*, 46 Mo. 209.

(*r*) *Paynter* v. *Carew*, 18 Jur. 417.

(*s*) *Macleod* v. *Jones*, 24 Chy. D. 289.

the mortgage, but it was a case where the plaintiff in the redemption suit had, after notice of sale was given, offered to pay off the mortgage, and the mortgagee had refused to accept payment and denied the plaintiff's right to redeem and the suit was commenced in order to establish this right (*t*). The general rule is that the pendency of an action to redeem is not a ground for restraining a sale under the power (*u*). If the mortgagor could stay proceedings under the power by commencing an action to redeem, he could in that way defeat the very object of the power, which was to give a speedy remedy and to avoid the delay of an action.

The fact that the mortgagor has become an insolvent is not a sufficient ground for staying a sale under the power (*v*).

Where a mortgage contained a covenant by the mortgagees not to exercise their power of sale without giving three months' notice, followed by a provision that no purchaser should be affected by knowledge that the notice had not been given, and a declaration of intention that the covenant should operate only so as to give the mortgagor a right to an action for damages against the mortgagees, it was held that a Court of equity had no jurisdiction to restrain the mortgagees from exercising the power of sale, although they had not given the required notice (*w*).

Nor will the Court by an *ex parte* injunction restrain a mortgagee from exercising his power of sale because he has not given proper notice, but will rather leave the person interested to attend the sale and notify intending purchasers of the facts, as it is better to put him to that inconvenience rather than to risk a possible injury to the mortgagee by interrupting the sale (*x*); but an injunction may in such a case be granted upon notice of motion therefor being given to the mortgagee (*y*).

(*t*) *Rhodes* v. *Buckland*, 16 Beav. 212.
(*u*) *Adams* v. *Scott*, 7 W. R. 213.
(*v*) *Gordon* v. *Ross*, 11 Gr. 124.
(*w*) *Prichard* v. *Wilson*, 3 W. R. 350; 10 Jur. N. S. 330.
(*x*) *Anon.*, 6 Madd. 10.
(*y*) *Gibbons* v. *McDougall*, 26 Gr. 214.

V. Payment before Sale.

The costs of proceedings to obtain a sale of the mortgaged premises are such a charge upon the estate as will entitle the mortgagee to proceed to a sale in case of non-payment, although the principal and interest have been paid (*z*), but where the costs are unascertained and the security is ample, a mortgagee, after tender of principal and interest, is not entitled to proceed with the sale (*a*).

A tender of the amount due is sufficient to stop the sale if made at any time before the sale actually takes place (*b*).

Where an excessive sum for costs or otherwise is demanded by the mortgagee as a condition precedent to staying proceedings and the money is paid under protest to prevent a sale, the over-payment may be recovered by action as having been paid under duress (*c*).

(To be concluded.)

A. H. MARSH.

(*z*) *Thompson* v. *Holman*, 28 Gr. 35; *Paynter* v. *Carew*, 18 Jur. N. S. 417.
(*a*) *Jenkins* v. *Jones*, 2 Giff. 99.
(*b*) *Ibid.*
(*c*) *Close* v. *Phipps*, 7 Man. & Gr. 586; *Fraser* v. *Pendlebury*, 10 W. R. 104.

TO THE MEMORY

OF

MR. JAMES BETHUNE, Q.C.

Gone ! Aye, his noble spirit's passed away
To the great God who fashioned it so large—
With purple lilies and brown myrtle spray
Bedeck the bier ! the sad last rites discharge !

Oh, pattern man ! kind, genial, manly, soul,
What brilliant talents nature to thee sent !
And yet, how large a part had honest toil
In building up attainments eminent !

Relenting death repented just too late,
And robbed the Halls of Justice of a peer :
Justitia, proud when thou her advocate,
Upon thy early grave sheds many a tear.

Though thou art gone, they memory ne'er will fade ;
Thy fellow-men will teach each growing son
To emulate thee, noble man ! self-made,
Cut off e'er half thy earthly work was done.

G. G. S. L.

EDITORIAL REVIEW.

Counsel's Right to Recover Fees.

Regina v. *Doutre*, 9 App. Ca. 745, bore within it the promised solution of the many intricate questions that divided the Supreme Court. As frequently happens in such cases, none of them were decided; but the Judicial Committee did decide a point which is practically of little service, because the event which will produce the conditions to which the decision is applicable will rarely occur.

The gist of the decision is contained in the following passage:—"A member of the Bar in England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his honoraria. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that Bar are understood to practise." That is no doubt the decision which an English Court would render. But would the foreign Court so decide? Suppose the advocate, in the course of his address, used libellous words, for which an action would lie in the foreign country, would he successfully defend on the ground that, as an English barrister, he had a privilege of speech in pleading which protected him against such an action?

The peculiarity of the case, however, is this, that, as regards the Crown, there was no *lex loci contractus*, and no

lex loci solutionis. The supplicant was retained, or employed, not because he was qualified to practise before Courts which advocates of other Provinces could not be heard in. The fact was that he was employed to perform work before a commission which happened to sit in a certain part of Canada in which, as an advocate, he was disqualified. His degree of advocate gave him no status there at all. He was simply a skilled person, chosen because of his profession it is true, but not because of his particular Provincial qualification, employed in Canada, by the Government of Canada, to perform work in Canada. And we cannot see why the case should have been complicated with questions of conflicting laws. The suppliant stood before the commission on an equal footing with his brother advocates of Nova Scotia and New Brunswick. He was entitled to address the commission, not because he was an advocate, but because he was employed by the Crown to appear there. A layman would have been equally privileged, if he had been employed to perform the same services. And in addition to this the suppliant presents his petition in a Canadian, not a Provincial, Court.

Unqualified Practitioners.

A complaint has reached us, which our correspondent desires to make public, that there are distributed through the country a number of unqualified practitioners who openly carry on a solicitor's business under the name of some qualified solicitor, or firm of solicitors, in some place remote from the locality in which their principal practises.

The method adopted is to put up a sign bearing the name of a solicitor, or firm of solicitors, and in all respects indicate to the public that the solicitor, or firm of solicitors, really practise at that place. The interior working discloses an articled clerk, or other unqualified person, who transacts the business. This is the way in which a certain gentleman (not so by Act of Parliament, as yet) is noticed in a paper published north of Toronto:

NEW LEGAL FIRM.

Messrs. —— & —— of Toronto have decided to open a branch office in Durham, which will be under the charge of

Mr. ——, a gentleman well qualified to give a good opinion or transact any legal business. For a number of years he has served in a firm which has a Dominion reputation, Messrs. ——, ——, & ——, and in addition to this has an unblemished record. He is a son of the well known ——, the importer and stock-raiser who has been Reeve of ——, Warden of the county of ——, and at the last local election contested South —— with ——, reducing a majority of over four hundred to slightly over a hundred. Should Mr. —— succeed as well as he anticipates, he intends buying a good stock-farm in the vicinity, and introducing stock, suitable for the expanding requirements of the farmers. We cannot recommend Mr. —— too highly for rectitude and good common sense, and trust that should any of our readers become involved in law, that they will call on Mr. —— and satisfy themselves that our recommendation is *bona fide*. The office is over McFarlane's drug store, and Mr. —— will commence practising in about a week.

There is a suggested relationship between this gentleman's projected stock-farming and his imperfect legal qualifications, which inclines us to rank him as half-calf.

Adams v. Coleridge.

The result of the trial of this painful action has received a good deal of comment from the lay press. The short cablegram which announced the result, though it might convey a good deal of information to a lawyer's mind, was very apt to mislead a layman, and induce him to believe that the learned Judge who presided actually disregarded the verdict, set it aside, and entered judgment for the defendant. Our acute and accomplished contemporary, the *Albany Law Journal*, is puzzled; while our learned friend of the *Central Law Journal* thinks that "it is so clear a right of the Judge to set aside a verdict when it is unsupported by any evidence that it is a matter of wonder that any lawyer should raise his voice in unison with those who, knowing nothing of the law, are presumptuous enough to criticise the judicial action of an able Judge, and what is more dangerous, we may say,

to impute improper motives to his action." If the practice in the United States is to set aside a verdict immediately upon its being rendered, because the learned Judge thinks it is unsupported by evidence, we should think the usefulness of juries was well-nigh gone.

Touching this trial we are without any authentic report of what transpired, at the time of writing, but the proceeding appears to us to be a most common one—one that takes place frequently, and is adopted in order to save expense. The defendant's counsel moves for a nonsuit. The learned Judge thinks there should be a nonsuit, but in case he should be wrong and the full Court should think otherwise, he submits the case to the jury, who find the damages. Then he nonsuits, or enters judgment for the defendant; for there is no real difference under the Judicature Act; and if the Court above think he is wrong, they are able to reverse the judgment and enter judgment at once for the plaintiff for the amount found by the jury—thus saving the expense of a new trial. We should not be astonished to find that this is what in fact transpired.

Since writing the above, we have received English Journals, from which it appears that our conjecture was correct. Notwithstanding, opinion is divided on the subject, and severe criticism has been passed upon Mr. Justice Manisty. If the defendant had not been the son of the Lord Chief Justice of England, attention would probably not have been directed to the trial at all. Because he was the son of Lord Coleridge, hungry criticism has fed upon the incident, and has attempted to point out that a course, perfectly allowable in other actions, should not have been followed in this one. No individual is of so great or so little importance that a special course must be pursued in trying his case.

The Late Mr. Bethune, Q.C.

Universally lamented, Mr. James Bethune, Q.C., died at his residence after a short but severe illness. He was a man of excellent abilities, to which he added untiring

industry, a genial manner, and a kindly disposition. He will be especially remembered by many young men who owed debts of gratitude to him for encouraging words spoken to them in their early struggles.

He was a member of the Quebec Bar as well as a Barrister of Osgoode Hall, and his name is associated with several of the great Ontario cases which went to the Judicial Committee of the Privy Council.

After the decision of the Supreme Court of Canada in *Lenoir* v. *Ritchie*, 3 S. C. R. 575, in which several of the judges expressed the opinion that the Provincial Governments had not the right to appoint Queen's Counsel, Mr. Bethune was the only one of those holding Provincial patents who threw off his silk gown—preferring not to wear the insignia of professional advancement while any doubt rested upon the title to them.

Murder by Necessity.

It has been finally decided in England that it is murder to kill a human being for the purpose of feeding on his flesh, and so preventing an apparently inevitable death from starvation. However this lamentable case may have been complicated by ingenious theories, no sensible man ever allowed himself to think that such an emergency as that in which the sailors of the Mignonette found themselves justified the base and cowardly act, the shocking and revolting crime, of which they were guilty. We have often heard of people having been driven by sheer hunger to steal food; but, while all were ready to sympathize with them, no one ever disputed that the taking under such circumstances was theft. Why then should they deny that killing a human being under similar circumstances was murder? If necessity could have been pleaded for any one, it should have been for the weak and exhausted boy, who required food more than the stronger men, and who, therefore, as a matter of natural necessity, had a better right to the sacrifice of one of them than they had to sacrifice him.

A Justice's Justice.

An admirer of our Commission of the Peace for a certain County, sends us the following, as an example of an instrument used in the administration of criminal justice:

SUMMONS.

PROVINCE OF ONTARIO, COUNTY OF TO WIT: } To of the villig of in the county of Bording Master.

Whereas, you have this day been charged before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said county of on the oath of one Charls B. For that you Bording Master did on the Saventeenth day of July, A.D. 1883, at County of that the Said Charls B. Borded with you and he the Sad complenent paded you in full up to date up the Sevnteenth and you hold one gole ring the proprty of Said complenent and you will not give up Sad ring to complenent contreerey to the form of the Statues.

Anonymous Correspondents.

We have lately received a number of letters from unknown correspondents. We have before announced, and we now reiterate, that anonymous communications cannot be noticed. They are not even read. It is not necessary that a correspondent's name should be published; but his name should accompany his communication as a guarantee of good faith.

NEW SUPREME COURT RULES.

For the purpose of equalizing the business in the several divisions of the High Court, the following rules have been passed:—

545. From and after the first day of January, 1885, all writs of summons for the commencement of actions shall be issued by the officers who now issue like writs in the Queen's Bench and Common Pleas Divisions of the said High Court of Justice, and shall be issued alternately in [*semble*, in rotation from] the Queen's Bench, Chancery, and Common Pleas Divisions of the said High Court. Writs issued by a deputy clerk of the Crown and Pleas, or a local registrar need not be signed or sealed by the clerk of the process.

546. All proceedings in actions to final judgment shall be carried on in that office in the same county where the writ of summons was issued, in which by the memorandum subscribed on the writ or by the notice of the writ the appearance is required to be entered, except where by any rule of court it may be otherwise provided, or where the court or a judge shall otherwise direct.

547. The plaintiff or his solicitor shall on presenting any writ of summons for sealing leave with the officer a copy of such writ, and of all the endorsements thereon. Such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. When the writ is issued in the Chancery Division of the High Court by the clerk of the process, such copy shall be forthwith transmitted by him to the clerk of records and writs. Where a writ is issued in the said division by a deputy clerk of the Crown and Pleas, such copy shall be forthwith transmitted by him to the deputy registrar, in whose office the appearance is required to be entered.

Marginal rules 21, 25 and 50, are hereby repealed.

548. Rule 420 is hereby amended by adding thereto the following provisions:—And in addition thereto shall be and hereby is empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said courts, or any of them, respectively were at the time of the passing of the Acts 33 Vict. (O.) cap. 11, 37 Vict. (O.) cap. 7—the Ontario Judicature Act, 1881—and are now done, transacted, or exercised by any judge of the said courts sitting at Chambers, save and except in respect to matters excepted by the sub-section *a*, of said rule.

549. Rule 543 is hereby repealed and the following substituted therefor:—In actions in the High Court of Justice no reference to arbitration or other reference, or examination for the purpose of discovery or examination of a judgment debtor on which fees may be payable otherwise than in law stamps, shall be taken before the judge of the County Court or local judge of the High Court, or local Master being also a judge of the County Court, by whom the order or appointment for such reference or examination has been made. References in administration matters under general order 638 of the Court of Chancery, and in partition matters under general order 648 of the Court of Chancery, and other like references in mortgage actions are excepted from the operation of this rule.

REVIEW OF EXCHANGES.

Central Law Journal.—4th July, 1884.

Liens of Vendors of Chattels for the Purchase Money, by LEONARD A. JONES. Concluded in the following number. The subject is discussed under the following heads:—Nature and extent of the lien; The vendor's possession essential to his retaining a lien; What change of possession destroys the lien; When the vendor is estopped by a resale by the vendee; When defeated or waived by giving credit. Numerous cases, English, Canadian and American, are cited.

Ibid.—11th July, 1884.

Retention of Extradited Prisoners for Other Crimes. Brown committed an offence in Wisconsin and fled to Indiana, which State delivered him up to Wisconsin, where he was tried for the offence and acquitted. He was then put on trial for another offence, and claimed that he should have been sent back to Indiana after his first acquittal, but the Supreme Court of Wisconsin thought otherwise. The provision in the U. S. constitution for interstate extradition is as follows:—"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Ibid.—18th July, 1884.

Abatement of Nuisances, by G. R. ELDRIDGE. Public, mixed, and private nuisances are defined. English and American authorities are cited.

Deeds of a Testamentary Character, by W. W. THORNTON. The discussion turns to some extent on the old feudal rule that estates of freehold could not be created to commence in futuro. "It may be laid down as a general rule that an instrument in the form of a deed, signed, sealed and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property," and is not to operate until after his death, is a will and not a deed.

Ibid.—25th July, 1884.

General Restrictions on Business Freedom by ELISHA GREENWOOD. Concluded in the following number. Rule 1. All covenants which restrain the business or industrial freedom of the covenantors universally,

or in a particular country, State, or in any considerable portion thereof, or between two countries, whether for all time, or only for a limited period, either absolutely or except on payment of tribute, are void, unless the business of the covenantee requires such restraint, or the contract be made to secure to each party the benefits of their joint industry, or to secure to the covenantor some advantage not otherwise obtainable, or the covenant does no more than secure to the covenantee the exclusive custom of the covenantor, whether for a limited period, or for all time, or binds the covenantor to sell to or labour for the covenantee exclusively, the benefit being reciprocal, or is incidental to the sale of a patented invention, or secret process of manufacture or compounding, or the business be one but lately discovered, and likely to fail if not restricted, or the covenantor provide the covenantee with employment in the business during the period during which the restriction is to operate, or the traffic to be abstained from is itself condemned by the policy of the State or nation. Sub-rule. But the necessity of the entire protection secured by the covenant must clearly appear to bring it within the operation of exception as to the business of the covenantee requiring the restraint. Rule 2. And such contracts are void even though made in another country where their validity is undoubted. Rule 3. And the consideration of such contracts, or the price of anything purchased in consideration thereof, can found no action in any court of justice, unless it has come into the hands of the promisor's agent, who can raise no defence of illegality.

Ibid.—1st August, 1884.

Equitable Estoppel as Affecting Title to Land, by W. F. ELLIOTT. "It is impossible to reconcile the authorities on the general subject that we have been considering, and it is, therefore, difficult to lay down any general rule. Perhaps the authorities will justify the statement that the doctrine of equitable estoppel is usually enforced in equity in suits in which the title to real estate is involved, but is not usually admitted or enforced at law in such cases, except in States where equity is administered through the means of legal actions and remedies, or where legal and equitable rights and remedies are combined and the ancient distinction done away with by the modern code system."

Ibid.—8th August, 1884.

The Modern Idea of Jurisdiction. By SEYMOUR D. THOMPSON. "The idea of jurisdiction entertained by the old jurists appears to have been that jurisdiction is simply the power to decide something in a given controversy—to proceed to judgment, to render some kind of a judgment—and that beyond this everything else related to the propriety of the judgment rendered. . . The modern idea, as distinguished from this, is that jurisdiction is not merely the power to proceed in a cause and to render some judgment therein; but that it is the power to render the particular judgment which was rendered." American cases are reviewed.

Liability of Employer for Negligence of Independent Contractors and their Servants, by FRANK C. HADDOCK. After citing a great number of cases the learned writer concludes:—"It will thus be

seen that in general, when work is committed to a competent contractor from which, if properly done, no injurious consequences can arise, the party authorizing the work is exempt from liability for injury resulting from negligence, which he had no reason to anticipate, because, (1): He has done all a prudent man can be required to do; (2) The workmen are not his servants. That there are at least four exceptions or modifications of the rule, under which the primary principal is held liable where: (1) He has been negligent in selecting an incompetent contractor; (2) The work to be done is itself wrongful, a nuisance, or likely to result in injurious consequences; (3) A duty rests upon him which the law does not allow him to shift; (4) The act or injury complained of is incidental to the fulfilment of the contract. There is no arbitrary rule determining what is incidental to the work; but a liberal interpretation of language is followed, and the act complained of may be ratified, raising liability."

Ibid.—15th August, 1884.

Restrictive Covenants in a Conveyance of Real Estate, by WILLIAM H. HAMILTON. The subject is discussed, as to restrictions on alienation, under the heads of, Those which are in general restraint on alienation; Those which restrict it for a limited time; Those which restrict it as to purchasers. Restrictive covenants as to the use and enjoyment of property are then dealt with.

Dying Declarations. ANONYMOUS. "It appears that the declarations are restricted: (1) To criminal cases; (2) To cases wherein the death of the party making the declarations is the subject of the charge, and generally (3) 'to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*,' and in New York, to cases of indictments for homicide."

Ibid.—22nd August, 1884.

Cohabitation and Intercourse as Marriage Rights, by DAVID STEWART. Some English and American authorities are cited.

Exhibition of Personal Injuries to the Jury, by M. W. HOPKINS. The aim of the learned writer is to make the point that the admission of such evidence places it before the jury only, and on appeal it cannot be put in a bill of exception. "It seems to us," he says, "in all good reason, that the exhibition of personal injuries, as evidence, is inadmissible."

Ibid.—29th August, 1884.

The Transportation of Live Stock, by HENRY AUSTIN. The liabilities of carriers in the transportation of live stock, and their attitude towards the shipper, are treated of. English, American, and Canadian cases are cited.

Breach of Contractual duty as a ground for Action by Strangers, by ELISHA GREENHOOD. English and American cases are cited.

Ibid.—5th September, 1884.

Liability of Agents upon Unsealed, Non-negotiable Instruments, by BENJ. F. REX. English and American cases are discussed.

Ibid.—12th September, 1884.

Partial Restrictions on Business Freedom, by ELISHA GREENHOOD. The learned writer formulates, illustrates, and cites authorities on the following rule:—Covenants which restrain the business or industrial freedom of a person within reasonable limits, as within a town, city, or county or district, or on a particular route, or as to a particular class of persons bearing some present relation to the covenantor, or as to particular land, are valid.

Ibid.—19th September, 1884.

Donatio mortis causa, by W. L. MURFREE, Sr. English and American cases are cited.

Proof of Foreign Laws and the Laws of other States, by JOHN D. LAWSON. Concluded in the following number. Rule 1. Where in one State or country the law of another State or country is the subject of inquiry, the law of the former will be presumed to be the law in the foreign State or country. Rule 2. Acts which are criminal by the law of the former and are *malum in se*, will be presumed to be crimes in the foreign State or country. Rule 3. The term "another State or country" within rule 1, does not (in the United States) include a State or country which has never been subject to the common law of England, or a tribe or nation uncivilized. Rule 4. Where one State or country adopts the statute of another State or country which has received a judicial construction in that country, such construction is presumed to have been adopted with the statute. Rule 5. The term "law" within rule 1 is restricted to the common law of the former; or the commercial law, and does not embrace the statute law of the former.

Ibid.—26th September, 1884.

The Statute of Frauds as Affecting Sales at Auction, by E. S. WHITTEMORE. Many English and American cases are cited.

Ibid.—3rd October, 1884.

Waiver of Mechanics' Liens, by ISAAC M. PAYNE. Instances of waiver are given. Generally, an agreement to waive the lien will be implied from another agreement to accept other security, inconsistent with the mechanic's lien, as payment of the contract price. An agreement to take a mortgage on the land is a waiver, but not an agreement to take other land if the land is not conveyed. If the lien holder induces a purchase by representing to the purchaser that he has other means of realizing, he waives the lien. An assignment of the claim has been held a waiver. Acceptance of a chattel mortgage is a waiver. On the question of acceptance of a promissory note the authorities waver.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B. Div.] [18th December, 1884.

EDGAR v. NORTHERN RAILWAY CO.

Negligence—Contributory negligence.

The appeal from the judgment of the Court below, 4 Ont. R. 201; 4 C. L. T. 28, was dismissed and the judgment affirmed.

Boulton, Q.C., for the appellants.

Pepler, for the respondents.

BRUCE v. McLAY.

Registrar—Dismissal during year—Return to municipality—Liability for excess of fees—Notice of action.

The appeal from the judgment of the Court below, 3 Ont. R. 23; 3 C. L. T. 395 *(sub. nom. Bruce* v. *McKay)*, was dismissed and the judgment affirmed.

Held, also, that notice of action was unnecessary.

Robinson, Q.C., for the appellant.

D. W. Ross, for the respondent.

LETT v. ST. LAWRENCE & OTTAWA RAILWAY CO.

Lord Campbell's Act—Death of wife—Husband's right of action.

Held, Burton, J.A., dissenting, reversing the judgment of the Court below, 1 Ont. R. 545; 3 C. L. T. 49, that a husband can maintain an action under Lord Campbell's act, for damages for the loss of his wife occasioned by the defendant's negligence.

McCarthy, Q.C., for the appellant.
Bethune, Q.C., for the respondent.

C.P. Div.]

HAMILTON PROVIDENT & LOAN CO. v. CAMPBELL.

Interpleader—Right to Growing crops—Mortgagee—Execution creditor—Recovery in ejectment.

The appeal from the judgment of the Court below, 5 Ont. R. 371; 4. C. L. T, 190, was dismissed and the judgment affirmed.

Muir, for the appellants.
G. H. Watson, for the respondents.

DOYLE v. BELL.

Constitutional law—Dominion Election Act—Penalty—Civil remedy.

Held, affirming the judgment of the Court below, that the Parliament of Canada has power to prescribe a civil remedy for breach of the Dominion Election Act by private action for a penalty.

H. J. Scott, Q.C., for the appellant.
Osler, Q.C., for the respondent.

C.C. Oxford.] [20th November, 1884.

ADAMSON v. YEAGER.

Principal and agent—Continuance of relationship—Reasonable time—Written instrument—Parol evidence.

Held, that an agreement, whereby the defendant placed his lands in the plaintiff's hands for sale, and was at liberty to withdraw them or sell the farm himself on payment of a commission, bound the plaintiff

for a reasonable time only, no time for the continuance of the agreement being expressed in it.

Held, also that what passed verbally between the parties might be received in evidence on the question of what was a reasonable time.

Ball, Q.C., for the appellant.

Geo. Tate Blackstock, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[Rose, J., 9th December, 1884.

REGINA v. WALKER.

Conviction under 32-33 Vict. cap. 28—Fine and costs.

A conviction under 32-33 Vict. cap. 28, for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment.

Held, good.

Holman, for the motion.

Hilton, contra.

[22nd December, 1884.

WALDIE v. VILLAGE OF BURLINGTON.

Order amending registered plan by closing street—By-law declaring street open—Quashing by-law—Estoppel.

By an order of the Judge of the County Court of the County in which the lands lay, upon the application of the plaintiff after hearing numerous parties, including the defendants, a certain registered plan was amended by, amongst other things, closing up a certain street, all of which appeared by recital in the order. Thereupon the defendant municipality passed a by-law declaring open the street in question. On a motion to quash the by-law,

Held, that the by-law should be quashed as having been passed in disregard and contempt of the order.

Held, also, that, as the order showed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application.

Laidlaw, for the motion.

Carscallen, contra.

PRITCHARD v. STANDARD LIFE ASSURANCE CO.

Private international law—Administrator—Right to sue for moneys payable in foreign State.

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which by one of the terms thereof was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them; and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held, on demurrer, a good defence.

MacGregor, for the demurrer.

Rae, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 20TH DECEMBER, 1884.

GREEN v. PONTON.

Registrar—Omission of instrument from abstract index—Evidence—Who entitled to recover.

Action against a registrar for omitting to enter on the abstract index as to a certain lot, the will of one M., which had been registered, whereby it was alleged that the plaintiff was damnified in purchasing a mortgage on the lot. The mortgage was first purchased by S., a solicitor, who searched the title and subsequently assigned to the plaintiff. S., though accustomed to act for the plaintiff in investing his moneys, was in purchasing the mortgage, dealing for himself. The plaintiff never authorized S. to search the title for him, and it was not searched when the assignment took place to the plaintiff.

Held, that the evidence showed that S., when he purchased, was fully aware of the existence of the will, and relied on the fact, as he thought, that the mortgagor had acquired a title by possession.

Held, also, that under the circumstances no benefit could be claimed in this action of the search made by S. on his own behalf.

Osler, Q.C., for the plaintiff.

Dickson, Q.C., and *W. N. Ponton*, for the defendant.

HAYES v. ARMSTRONG.

Provincial election—Returning officer—Refusal to delay return after notice of recount—Evidence of—Person aggrieved—Jurisdiction.

Action by the plaintiff, a defeated candidate at an election for the Legislature of Ontario, against the defendant, the returning officer, for wilfully contravening the provisions of R. S. O. cap. 10, sec. 125, in not delaying his return after receiving notice from the County Judge of a recount of the ballots. The learned Judge at the trial held that the plaintiff was a person aggrieved within the meaning of section 181 of the Act; that the defendant could not question the power of the County Judge to give the appointment or issue notice on the materials before him, because the order of the Court or Judge must be obeyed while it stands, where as here there was jurisdiction; but he also held (which was affirmed by the full Court, Cameron, C.J., dubitante,) that the evidence did not show that the notice of the recount came to the knowledge of the defendant before he made his return, and therefore he did not wilfully contravene the section, and the plaintiff therefore could not recover.

Lount, Q.C., for the plaintiff.
Aylesworth, for the defendant.

FLETCHER v. NOBLE.

Promissory notes—Consideration.

In an action on four promissory notes made by the defendant, one H., payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant surety; that under the laws of Michigan only persons of 21 years of age could homestead lands, and that the plaintiff was under that age. There was no representation by the plaintiff that he was of such age; while the fact was as much within the knowledge of H. as of the plaintiff. H. also obtained a surrender from the plaintiff of his interest in the land, whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and got the same rights which he would have got if the plaintiff had been of full age.

Held, that it could not be said there was no consideration for the notes, and the plaintiff was therefore held entitled to recover.

G. T. Blackstock, for the plaintiff.
Osler, Q.C., for the defendant.

HUGHES v. HAND-IN-HAND ASSURANCE CO.

Insurance—Reference to arbitration—Costs of arbitration and award—Construction of order.

After an action had been commenced on a policy of assurance containing the statutory conditions, the defendants gave notice of arbitration under the condition in that behalf, when the Court made the following order: "and counsel for the defendants agreeing thereto, and abandoning all defence to this action, and admitting their liability under the policy sued on, it is ordered that all proceedings in this action be stayed, the plaintiff to be at liberty to sign judgment and proceed in this action for such amount as may be awarded to him by the arbitrator or arbitrators now or hereafter to be appointed between the parties under the policy of insurance sued on in this action, and the statutory condition therein in that behalf, together with the costs of this action, etc.," "and it is further ordered without the consent of the defendant that either party be at liberty after the making of said award to apply to a Judge in chambers in respect of the payment of the costs of the reference and award."

On motion to Rose, J., an order was made directing the defendant to pay the costs of the reference and award.

On appeal to the Divisional Court, Cameron, C. J., was of opinion that the appeal should be allowed, and Galt, J., that it should be dismissed. The Court being equally divided, the judgment was affirmed and appeal dismissed.

G. H. Watson, for the plaintiff.
Foster and *J. B. Clarke*, for the defendant.

WARD v. HUGHES.

Assignment of chose in action—Absolute in form though interest retained by assignor—Action, by whom—Failure of consideration—Evidence of.

An assignment of a mortgage on land was absolute in form though, as a matter of fact, the assignor retained an interest in it himself.

Held, Rose, J., *dubitante*, that an action on the covenant in the mortgage must be brought in the name of the assignee.

At the trial, the learned Judge dismissed the action on the ground that that there was a total failure of consideration for the mortgage. The Divisional Court was not satisfied that there had been such failure of consideration, and granted a new trial, with leave to have such parties added as might be deemed necessary.

George Bell, for the plaintiff.
The defendant in person.

WEBSTER v. HAGGART.

Award—Misconduct of arbitrator—What constitutes.

Held, that the improper reception or rejection of evidence does not amount to legal misconduct on the part of the arbritator, so as to entitle a party to impeach the award.

Milligan, for the plaintiff.

Osler, Q.C., and *Justin*, for the defendant.

PORTEOUS v. MUIR.

Promissory note—Parol evidence—Admissibility—Suspension of time for payment.

To an action on a promissory note, payable on demand, the defendant set up a parol agreement whereby the payment of the note was to be suspended for two years.

Held, that evidence of such parol agreement was not admissible.

Per Galt, J. Even if such evidence were admissible, it showed that the agreement never came into effect, because one of the conditions upon which the agreement was made was not complied with.

H. P. O'Connor, for the plaintiff.

Moss, Q.C., for the defendant.

McKENZIE v. McLAUGHLIN.

Licence—Right to revoke—Estoppel—Parol evidence.

The plaintiff by a lease under seal leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant urged that prior to his accepting the lease and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct and not made part of the written agreement, was entered into whereby the defendant was to have permission or licence to remove certain rough shelving, etc., and to fit up the shop including the portion reserved by the plaintiff, with handsome and ornamental show cases during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement and with the plaintiff's consent the show cases were put in.

Held, that the evidence of such agreement was not admissible as adding to the written agreement; but even if admissible it failed to establish the agreement. Even assuming it to be proved, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and

not being under seal the licence would be merely a parol licence, not incidental to a valid grant and therefore revocable; and the fact of its being, as alleged, for a term certain, could make no difference.

Held, also, that the plaintiff was not estopped by his conduct from denying the defendant's right to retain the show cases.

McCarthy, Q.C., for the plaintiff.
Moss, Q.C., for the defendant.

HORNER v. MERNER.

Agreement—Collateral verbal promise—Quantum meruit—Consensus ad idem.

The plaintiff, in November, 1883, was engaged by A. M. as foreman of his brewery under an agreement, as he alleged, that he was to take charge of the brewery and make two brewings; and if they turned out well he was to be paid the same wages as one B. got, which appeared to be $75 a month; that the brewings did turn out well, and he became entitled to the wages; that he continued working for A. M. for the same wages until 21st June, when, owing to financial troubles, A. M. left, leaving plaintiff's wages unpaid; and A. M.'s father, S. M., who was a large creditor, took charge of the business and, as plaintiff alleged, verbally promised that if plaintiff would continue, he would not only pay him his wages for the past, but also for the future, and that plaintiff remained on these terms until 21st August, when he was discharged. Both A. M. and S. M. denied the agreement as alleged by plaintiff. The jury found that the agreement was as claimed by the plaintiff, and a verdict was entered against A. M. on this for the time prior to his departure, and against S. M. for such time and also for the subsequent period.

Held, that in any event there could be no recovery against S. M. as to the time prior to A. M.'s departure because the alleged promise was merely collateral and should have been in writing, and as to the subsequent period the evidence showed that the plaintiff could only recover on a *quantum meruit*, and he had been so paid; and that as to A. M. the evidence was most conflicting and would lead to the conclusion that the minds of the parties had never been *ad idem;* and therefore the recovery should have only been on a *quantum meruit;* and that unless plaintiff would consent to reduce his verdict to an amount ascertained on such basis, there must be a new trial.

John King, for the plaintiff.
Osler, Q.C., for the defendant.

HALL MANUFACTURING CO. v. HAZLITT.

Sale of goods—Property passing—Landlord and tenant—Right to remove tenant fixtures after expiration of term.

On 5th July, 1882, the plaintiff sold four Leffell double turbine wheels to U. & Co. under a written agreement that the title and property therein should not pass until the whole purchase money was paid, but merely he right to possession should pass to them, which should be forfeited on default of payment, or on the goods being seized under distress or execution, etc., the sale being conditional, and punctual payment being essential to it. The wheels were received by U. & Co., and were placed in a flume attached to a pulp and paper mill erected by them on land, with water privilege, occupied under a written agreement for a lease made with H. & H., the agreement providing that the lease was to contain provisoes for forfeiture in the event of bankruptcy or nonpayment of rent or nonperformance of covenants. A lease was drawn up but was never executed. The wheels were placed in the flume so as to be capable of being taken out by the removal of a few boards and the expenditure of a few dollars. In February, 1883, the sheriff, under an execution against goods, seized the chattel property, but not the wheels, and about the same time U. & Co. gave the key of the premises to H. & H. and voluntarily gave up possession to them. And in March following U. & Co.'s interest in, amongst other things, the wheels was sold to S. under proceedings to realize the amount of certain mechanics' liens; the lease and all the property of U. & Co. became vested in the defendants, the Ontario Pulp Co., who acquired the interests of H. & H. and S.; U. & Co. made default in their payments to the plaintiffs, who in January demanded the wheels, which the defendants refused to deliver up, claiming them as their property. In an action to recover amount due for said wheels,

Held, under the circumstances that the plaintiffs were entitled to recover.

C. H. Ritchie, for the plaintiffs.

Osler, Q.C., for the defendants.

[OSLER, J.A.

GARDINER v. KLOEPFER.

Assignment for creditors—Assent of creditor.

After the execution of a deed of assignment in trust for creditors, the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate, and a resolution was also passed to pay certain arrears of wages; and he examined and

reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default, and issued execution, and then attacked the deed.

Held, that the defendant must be deemed to have assented, and was estopped from denying its validity.

Re BELL TELEPHONE CO. v. THE MINISTER OF AGRICULTURE.

Patent Act of 1872—Court, constitution of—Parliament of Canada—Ultra vires—Power of Minister.

Section 28 of the Patent Act, 1872, after providing for certain cases in which patents are to be null and void, continues:—"provided always that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final."

Held, that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act, and that the constitution of such a court was not *ultra vires* of the Parliament of Canada as infringing upon subjects of exclusive Provincial regulation; and also that it was competent for the Minister to decide as to the existence of disputes arising for his decision.

[ROSE, J., 3RD DECEMBER, 1884.

THE CORPORATION OF STRATFORD v. WILSON.

Municipal Corporation—Agreement with officer to account for fees received outside of his office—Validity.

The plaintiffs appointed the defendant Chief of Police of the town of Stratford at a named salary, but stipulated that he should account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as County Constable.

Held, that, under the 5 & 6 Ed. VI. cap. 16 and subsequent Acts in force in this Province, the agreement to account for such fees was invalid.

Woods and *Smith*, for the plaintiffs.

Idington, *Q.C.*, for the defendant.

[9TH DECEMBER, 1884.

MACDONELL v. ROBINSON.

Libel—Public newspaper—Defence, sufficiency of—Demurrer.

Action for a libel on the plaintiff published in a newspaper called *The Week*. The defence set up was that the plaintiff had for some time prior to the alleged defamatory publication addressed open letters to the public through the medium of the public press and had invited public attention to his (the plaintiff's) character and position as a barrister and solicitor, and had challenged public criticism upon his conduct in connection with the subject matters referred to in the said article; and such criticism invited by the plaintiff had been made and had appeared in various newspaper articles, and letters and correspondence from time to time immediately prior to the said article, and such article was a moderate expression of opinion thereupon and in no way damnified the plaintiff as a barrister and solicitor, and the defendant further says that the alleged libels and words were and formed part of an article printed and published in the said newspaper called *The Week*, and which said article was a fair and *bona fide* comment upon a public matter of public and general interest, and it was printed and published *bona fide* and for the benefit of the public, and not otherwise, and without any malicious intent or motive whatever.

Held, on demurrer, a good defence.

Wallace Nesbitt, for the plaintiff.

Falconbridge, for the defendant.

CHANCERY DIVISION.

[BOYD, C., 19TH NOVEMBER, 1884.

McCARTER v. McCARTER.

Liability of executors for estate moneys received by solicitor—Negligence.

A. B. and C., three executors, sold certain estate of the testator. C., who was entitled to the annual income of the proceeds, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums, $980 and $1,580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February 1884 the solicitor absconded, causing a loss to the estate of $1,960, the balance then in his

hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default."

Held, that all three were equally liable and must make good the amount to the estate.

Laidlaw, for the plaintiffs.

G. H. Watson, *Ermatinger*, and *Teetzel*, for the defendants.

[26TH NOVEMBER, 1884.

LABATT v. CAMPBELL.

Will, construction of—Devise to charities—Mortmain—Perpetuities—Failure of bequests—Incorporated Synods—Power to hold in mortmain.

R. P. L. by his will directed his executors, "by and out of the moneys which shall be received by them from the P. B. and M. Co., for or on account of the debt or sum of $35,000 owing and secured by mortgage, by that Company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of $15,000, part thereof to the Bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized in the power of the Bishop of Algoma aforesaid for the time being, from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed, and the income of such investments to be applied in and for the education and qualifying of John Eskinah, an Algoma Indian at present of the Shingwauk Home, Sault Saint Marie, Algoma aforesaid (heretofore supported by me) as and for a Missionary in the Diocese of Algoma aforesaid, for and during and until such time as the Bishop of the said Diocese for the time being shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid forever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such Bishop, for the time being for a like purpose and during such time as he shall think proper, but for which applications the Trustees and Executors shall not be responsible. And after payment of the aforesaid legacy, I give and bequeath the following legacies to be paid out of the same fund or moneys, namely:

"To the treasurer for the time being of the Algoma Missions in British America, the sum of $1500.00 of Canadian Currency for the benefit of those missions.

To the treasurer for the time being of the Huron Missions in British America, the sum of $1500.00 of the aforesaid Currency for the benefit of those missions.

And to the treasurer for the time being of the Ontario Mission in British America, the sum of $2500.00 of the aforesaid Currency for the benefit of those missions.

Held, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others, was intended to set apart a fund which was to have perpetual continuance, and in which no individual was to have a personal right and, following, *Gillian* v. *Taylor*, L. R. 16 Eq. 584, that such bequest was void.

Held, also, that the bequest to the treasurer for the Algoma Missions was a charitable gift, and must fail because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. 2 c. 36, inasmuch as there was no incorporation of Algoma for Ecclesiastical or Missionary purposes with such powers.

Held, also, that the bequests to the treasurers of the Huron and Ontario Missions respectjvely, were intended for the missions sustained by the Incorporated Synods of the Dioceses of Huron and Ontario, and that by virtue of their acts of incorporation, both these Dioceses were enable to hold lands, etc. in mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by their respective defendants.

Lash, *Q.C.*, and *J. Mayne Campbell*, for the Bishop of Algoma and A. H. Campbell.

Moss, *Q.C.*, for the next of kin.

Walkem, *Q.C.*, for the Synod of Ontario.

Betts, for the Synod of Huron.

[17TH DECEMBER, 1884.

STOBBART v. GUARDHOUSE.

Will, construction of—Child or children.

T. S., after providing for his widow in his will, made the following devise:—"And I give and devise to my nephew R. S., lot No. 30 in the 2nd con., said Township of Etobicoke during the term of his natural life, (excepting he have a child or children) if not, at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, etc. * * " The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children, and died leaving his widow and several children him surviving.

In an action by the widow of T. S. claiming that R. S. was only entitled to a life estate in the lot, and that she was entitled to it in fee under the residuary clause.

Held, following *Lethicullieur* v. *Tracy*, 3 Atk. 796, that an estate in fee may by implication be vested in the child, and that by applying the rule in *Bifield's* case (acted upon in *Doe d. Jones* v. *Davis*, 4 B. & Ad. 55.) and reading "child or children" as *nomen collectivum* created an estate tail in R. S., that "child" under the circumstances was not a *designatio personæ*, but comprehended a class and that the plaintiff must fail.

W. Mortimer Clark, for the plaintiff.

McMichael, Q.C., and *A. Hoskin, Q.C.*, for the adult defendants.

J. Hoskin, Q.C., for the infant defendants.

IN CHAMBERS.

[ROSE, J., 5TH DECEMBER, 1884.

KINNEAR v. BLUE.

Married woman—45 Vict. cap. 19—Judgment under rule 80.

Held, that, since 45 Vict. cap. 19, where there is uncontradicted evidence of separate trading, separate credit, and separate estate of a married woman, and an uncontravened liability for the debt sued for, judgment may properly be entered against the married woman under Rule 80 with execution against her separate estate only.

F. E. Hodgins, for the motion.

J. B. O'Brian, contra.

MACDONALD v. NORWICH UNION INS. COY. CLARKSON v. FIRE INS. ASSOCIATION.

Examination for discovery—Party for whose benefit action is brought—Rule 224.

One McLean was insured in the defendant Companies, and, becoming unable to meet his engagements, he assigned the policy in the Norwich Union Ins. Coy. to the plaintiff Macdonald, a creditor, to secure his debt, and the policy in the Fire Ins. Association to the plaintiff Clarkson as trustee for the benefit of creditors. These actions were brought upon the policies by the assignees.

Held, affirming the order of the Master in Chambers that McLean was liable to examination for discovery under Rule 224, as a person for whose immediate benefit the suits were being prosecuted.

Shepley, for the appeal.
Wallace Nesbitt, contra.

NEW BRUNSWICK.

In the Supreme Court.

[OCTOBER, 1883.

VERDON v. OLIVER.

(Equity Appeal.)

Equity—Practice—Amending award—Prayer for general relief—Specific relief.

The plaintiffs and the defendant having submitted to arbitrators the matter of certain actions at law brought by the plaintiffs in right of the female plaintiff against the defendant, and an award having been made in plaintiffs' favour for $683, which (as was alleged) had been improperly reduced to that sum by the arbitrators taking into consideration certain dealings between the defendant and the male plaintiff, which were no part of the matters referred; upon a bill filed to amend the award by adding the amount allowed to defendant in respect of his claim against the male plaintiff,

Held, that the power of the Court to rectify an award extends at most to errors whereby the award does not express what the arbitrators intended it should, and that as the award in this case expressed what the arbitrators intended, the Court could not interfere.

The bill prayed that the award might be amended (as above) and that the defendant should be decreed to pay to the plaintiffs the whole amount coming to them upon the award being so rectified, and that in all other respects the award should stand and be forthwith acted upon, and be binding upon the parties, and that the plaintiffs should have all other relief in the premises to which they were entitled.

At the hearing the plaintiffs' counsel claimed that in the event of his failure to have the award rectified as prayed he was entitled to have the award set aside because of the arbitrators having exceeded their authority.

Held, that the plaintiffs were not entitled to this relief, as it was inconsistent with the relief specifically prayed for.

Held, also, that an amendment should not be allowed to convert a bill filed for one purpose into a bill for a wholly opposite purpose.

EARLE v. BOTSFORD.

Donatio mortis causa—Judge—Right to try causes at Circuit to which he has not been assigned.

A., a few days before his death, and while in good health, handed to one F. a box with a letter addressed to the defendant, and requested F. to forward the box to the defendant "in case anything should happen" to him (A). The box contained a number of debentures and other valuables, labelled for different persons, and also a will, insufficiently executed, disposing of the same articles in substantial accordance with their labelling. A., a few days afterwards committed suicide. After his death F. delivered the box to the defendant.

Held, that this did not constitute a valid *donatio mortis causa*.

Held, that in order to give a Judge jurisdiction to try a cause at a Circuit Court, it is not necessary that he should have been assigned to that Circuit.

DEFORREST v. HOLLAND.

Declaration—Pleading to one count only—Judgment on other counts without notice—Costs, taxation of—Setting aside judgment.

A declaration contained two counts, to only one of which the defendant pleaded, and plaintiff thereupon had his costs taxed without notice to the defendant's attorney and signed judgment on the other count for want of a plea.

Held, irregular, as notice of taxation should have been given, and the judgment was set aside with costs.

[NOVEMBER, 1883.

HAMILTON ET AL. v. CALDER.

Trespass—Goods illegally placed on land of another—Right of owner to enter and retake—Search Warrant—Stolen goods—Information—Right to arrest person on whose land goods are found—Pleading.

When A's goods have been wrongfully taken by another and placed on the land of B., and the latter, although requested by A. to allow him to remove them, does not permit him to do so,

Held, that A. may then lawfully enter and remove his goods.

In order to obtain a search warrant under the Act 32 & 33 Vict. cap. 30, it is not necessary that the information should allege that the goods have been stolen by the party whose premises are sought to be searched and it is sufficient if it allege that they have been feloniously stolen.

Under a search warrant, the goods alleged to have been stolen, having, upon the search made under the warrant, been found in the store and warehouses of a party, who, though not the person charged in the information with having stolen them, had refused to allow the owner to see them or to give him any satisfaction regarding them, the constable is justified not only in taking the goods so found but also the body of the party on whose premises they were found, before the Justice who issued the warrant to give an account of how he came by them.

In an action for taking goods under a search warrant, the defendants pleaded that the goods were feloniously stolen by one G. or some person or persons unknown to defendant, to which plaintiff replied "that the said goods were not feloniously stolen by the said G. as alleged."

Held, bad, because while professing to answer the whole plea, it did not do so.

JONES v. DEWOLF ET AL.

Contract by correspondence—Construction of.

Where it is sought to establish a contract from a correspondence, the whole of the correspondence which has taken place between the parties must be taken into consideration; accordingly where a letter written by plaintiff to defendant and replied to by the latter made a complete contract, but before the contract was performed or there was any breach, other letters passed between the parties from which it appeared that both parties still treated the matter as being in negotiation,

Held, that there was no binding contract.

CHEESEMAN v. HATHEWAY.

Verdict—Special questions left to jury—Jury not unanimous in answering—Whether verdict can be entered within two hours—Con. Stat. N. B. cap. 45, sec. 19.

In an action to recover damages sustained by plaintiff in consequence of being knocked down upon a public highway by a runaway horse belonging to defendant, the defence was that the horse had been left tied to a post by a strap from the bridle, and that he was also secured by a strap from the foot to a part of the waggon; and that a sudden noise caused him to take fright and break loose.

On the trial of the Judge directed the jury that if they found that the horse was sufficiently fastened, either by the head or by the foot, the defendant was entitled to a verdict; and he asked them if they gave a verdict for plaintiff, to state how they found both as to the head fastening and foot fastening of the horse. Cap. 45, sec. 79, of the Con. Stat. provides that if a jury cannot agree within two hours any five of the seven may return a verdict. The jury returned into Court within two hours and the foreman in answer to to the usual question by the clerk, stated that they found a verdict for the plaintiff, and on being asked by the Judge how they found on the two questions left to them, it appeared that they were unanimous as to the head fastening being insufficient; and that five of them thought the foot fastening also insufficient. The verdict was thereupon entered for the plaintiff. The counsel for both parties were present when verdict was returned but no one drew attention to the circumstance of the finding by five only as to the foot fastening.

Held, by Allen, C. J., Wetmore and King, JJ., that the verdict could not be treated as a general verdict for the plaintiff, but that the verdict and answers to the special questions must be taken together, and that the jury, not being unanimous in their answer to one of the questions (the same being essential to the finding) the verdict should not have been received within the two hours.

Held, by Weldon and Palmer, JJ., (1) that as the general verdict was found by all the jurors, that was sufficient as they were not bound to answer questions specially. (2) that the counsel for defendant having allowed the verdict to be entered without objection, it was now too late to avail himself of it as a ground for new trial.

That in order to constitute a waiver of the irregularity there must either be an express assent by the counsel, or circumstances from which an assent might fairly be inferred.

MAYOR, *etc.*, OF SAINT JOHN v. LOCKHART.

Evidence—Official of Municipal Corporation—Cash-book kept by—Entries showing balance against self—Admission to auditors of correctness—money had and received—Evidence of.

The defendant was chairman of Commissioners of the Water Supply in the City of Saint John, and as such kept the cash-book, shewing his receipts and disbursements. In it he made entries in his own hand-writing, charging himself with the receipt of moneys for the use of the plaintiffs (the City Corporation), and also made entries by way of discharge, and when the balance between his receipts and outlays was ascertained by auditors appointed by the Corporation under the powers given the latter by Act of Assembly, and he was informed of such balance, he did not dispute its correctness, and when asked if he could explain the balance against him, he said he could not. The auditors then told him they would have to report it (to the plaintiffs), to which he replied, "well, you will just have to report it."

Held, sufficient evidence to enable the plaintiffs to recover such balance, either on a count for money had and received, or on account stated.

[DECEMBER, 1883.

COARSER v. KIRKBRIDE.

Evidence—Negligent driving—Opinion of witness.

In an action for negligent driving, the defendant was asked by his counsel whether anything more could have been done than was done to prevent the collision which occurred.

Held, improper, as being the point which the jury had to decide; and that the defendant should have stated the facts, without giving his opinion, and left it to the jury to determine whether he could have done anything more than he did to avoid the collision.

JONES *et al.* v. TUCK.

Judge's order—Stay of proceedings—Cause directed to be entered on motion paper—Setting aside award pending stay.

A cause was referred to arbitration, and an award made in favour of the defendant. The plaintiff then obtained an *ex parte* order from a Judge, directing that all further proceedings in the cause be stayed until an opportunity was afforded the plaintiff of moving the Court in the ensuing

term, and that the cause be set down on the motion paper of said term for argument without further order. A copy of this order was served on the defendant. Subsequently the plaintiff gave notice of motion to set aside the award and for a new trial, the notice also stating that he abandoned that part of the Judge's order which directed the cause to be entered on the motion paper.

Held, that while the Judge's order stood containing the stay of proceedings, the plaintiff could not give the notice of motion for a new trial, and the application was therefore refused.

MILLER v. BOSS, *et al.*

Judgment—Estoppel—Amount not recoverable in former action—Set-off.

To an action by the plaintiff the defendant pleaded the general issue and gave notice of a set-off of a promissory note made by the plaintiff in favour of the defendants. Upon the trial it was shown that after the note had become overdue the defendants had brought an action against the present plaintiff on the common counts for goods sold and delivered and work and labour, etc. The amount of the promissory note was not recoverable under the declaration in the former action, nor had the then plaintiffs (the present defendants) attempted to prove the promissory note as part of their demand in that action.

Held, that by the recovery in the former action the defendants were not precluded from setting up the promissory note in this action.

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POWERS OF SALE IN MORTGAGES.

VI. CONDUCT OF THE SALE.

A MORTGAGEE may properly sell under what are known as depreciatory conditions, and in many cases it will be to the advantage of both mortgagor and mortgagee that he should do so, but the occasions on which he may use such conditions, and the extent to which they may be employed must depend upon the particular circumstances of each sale (*a*).

If the power authorises a sale by public auction, or private contract, it is not incumbent on the mortgagee to first offer the property for sale by auction, before selling by private contract (*b*), but if the power be for sale by public auction, a private sale will not be valid (*c*).

So long as the transaction is *bona fide*, the mortgagee may allow the whole or any part of the purchase money to remain on mortgage, in which case he must account to the mortgagor or other person entitled to the surplus for the whole amount thus secured in the same manner as for cash received (*d*). It is submitted however that a condition of

(*a*) See *Falkner* v. *The Equitable Reversionary Society*, 4 Jur. N. S. 1214; and *Dance* v. *Goldringham*, L. R. 8 Chy. App. 902.

(*b*) *Davey* v. *Durrant*, 1 De G. & J. 535.

(*c*) *Brown* v. *Dumaresque*, 3 Moore P. C. 457.

(*d*) *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97; *Bailey* v. *Ætna Ins. Co.*, 10 Allen (Mass.) 286. See *Davey* v. *Durrant*, 1 De G. & J. 535.

sale *requiring* a certain portion of the purchase money to remain on mortgage, and not leaving the matter to the option of the purchaser would be highly objectionable.

Where the mortgage provides that the sale shall be for cash, such requirement must be complied with, and the sale cannot properly be made upon credit, but the mortgagee may give credit for such portion as will be coming to him, doing so at his own risk (*e*).

Credit may properly be given unless there is express provision against it in the power (*f*).

The mere delay of a few days, for the purpose of closing the transaction by making the deed and payment of the money, will not be regarded as a giving of credit (*g*).

It would be unreasonable for the mortgagee, contrary to the protests of people present at the sale, to insist that the purchase money shall be paid in full in specie within an hour of the sale (*h*).

The custom of auctioneers to accept on sales of large properties a cheque in lieu of cash, for the deposit is a reasonable and proper one, and where at a mortgagee's sale under his power, such a cheque was accepted from a purchaser, but was afterwards dishonored and the sale by reason thereof became abortive, it was held that the mortgagee had acted reasonably, and he was allowed to add the costs of the abortive sale to his mortgage claim (*i*).

It has been held that it is not incumbent on a mortgagee to sell the property in lots in order to obtain a better price(*j*), but this cannot be regarded as a general rule, for it is the duty of the mortgagee to conduct the sale as a prudent owner would do (*k*). If the mortgagee do sell in parcels and sufficient is realized for the satisfaction of the mort-

(*e*) *Strother* v. *Law*, 54 Ill. 413.
(*f*) *Markey* v. *Langley*, 92 U. S. Sup. Ct. Rep. 142.
(*g*) *Strother* v. *Law*, 54 Ill. 413.
(*h*) *Goldsmith* v. *Osborne*, 1 Edw. Chy. (N. Y.) 562.
(*i*) *Forrer* v. *Lacy*, 25 Ch. D. 636.
(*j*) *Adams* v. *Scott*, 7 W. R. 217.
(*k*) See *Ellsworth* v. *Lockwood*, 9 Hun (N. Y.) 548.

gage before all the parcels are sold, the mortgagee should not proceed further with the sale (*l*)

If the power authorises a private sale there is no objection to the mortgagee entering into a contract for sale before the expiration of the notice required by the mortgage, and though the purchase cannot be completed until after the expiration of the stipulated notice, the contract will be valid, provided that it be made conditional upon non-redemption in the meantime (*m*).

A sale by a mortgagee must be a real sale and not a mere sham for the purpose of cloaking some other transaction. Therefore, where a mortgagee desiring to donate some of the mortgaged lands to charitable purposes entered into an agreement to sell a portion of the lands at a valuation, for hospital purposes, and to give the price to the charity, and then conveyed in pursuance of the contract, it was held that the sale was not authorised by the power (*n*).

VII. Conveyance, Making Title, etc.

The fact that the mortgagor has in the mortgage covenanted to join in the conveyance under the power of sale does not enable the purchaser under such power to refuse to complete his purchase, notwithstanding the fact that the mortgagor refuses to join. Such a covenant is inserted for the benefit of the mortgagee only (*o*).

Unless he be excused by the terms of the power, the mortgagee is bound to furnish the purchaser with proper evidence of the facts which entitle him to exercise the power, and the mortgagee's own unsupported statutory declaration is not sufficient (*p*).

The mortgagee must of course be in a position to put the purchaser into possession, but if he asserts that he is ready to give possession, the purchaser must perform his

(*l*) *Charter* v. *Stevens*, 3 Denio (N. Y.) 33.
(*m*) *Major* v. *Ward*, 5 Hare 598. See *Ford* v. *Heeley*, 3 Jur. N. S. 1111.
(*n*) *Davey* v. *Durrant*, 1 De G. & J. 535.
(*o*) *Corder* v. *Morgan*, 18 Ves. 344.
(*p*) *Hobson* v. *Bell*, 3 Jur. N. S. 190.

part of the contract in order to enable the mortgagee to perform his part (*q*). If however the mortgagee should neglect to turn the mortgagor out of possession, the interest of the latter would become divested by the sale and he would become tenant at sufferance to the purchaser (*r*).

Where the mortgagee is not in a position to make title himself, or to compel some third person to do so, he cannot hold the purchaser to his contract, for it is a general rule that where a vendor sells property which he is neither able to convey, nor to compel other persons to convey, the purchaser may repudiate the contract, and he is not bound to wait to see if the vendor can induce some third person to join in making a good title (*s*).

A mortgagee, like a trustee or other person occupying a fiduciary position, is not bound to give covenants for title or any other covenant than one that he has done no act to incumber the estate (*t*).

VIII. Position of Purchaser.

The purchaser under a power takes the same interest as if the instrument creating the power and the instrument executing it were incorporated in one deed, and the exercise of the power is therefore an absolute bar to all equity of redemption and to all interests arising subsequently to the creation of the power (*u*).

It will sometimes happen that by reason of some defect in the sale proceedings the purchasers will take a redeemable interest only. With respect to such cases, the general rule has been laid down that a person who under a mortgagee becomes possessed of a property, supposing himself to be its purchaser, if it shall afterwards appear that he is not validly clothed with that character but only holds a lien on the property in virtue of the money advanced by him on the

(*q*) *Allen* v. *Martin*, 5 Jur. 239.

(*r*) *Kinsley* v. *Ames*, 2 Metcalf's Rep. 29.

(*s*) *Forrer* v. *Nash*, 35 Beav. 167.

(*t*) Lewin on Trusts (6th Ed.), 887; Sug. V. & P. (14th Ed.) 69.

(*u*) *Doolittle* v. *Lewis*, 7 Johns. Chy. (N. Y) 45; *Jackson* v. *Henry*, 10 Johns. Cas. (N. Y.) 185.

supposed purchase, cannot be so treated as to make him liable to render accounts as an ordinary mortgagee in possession; it is essential to the creation of such a liability that he should have known that he was in possession as mortgagee (*v*).

Where such a purchaser has made improvements on the property under the belief that he is absolute owner thereof, he will, in the event of the sale being set aside for irregularity, be allowed for such improvements, in so far as they have enhanced the value of the property, and he will not be restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee (*w*). But where a mortgagee had obtained a foreclosure decree which was defective by reason of certain outstanding claims against the mortgaged estate remaining unforeclosed, and the mortgagee then sold the property to a purchaser, with notice of the outstanding claims, who entered and made improvements upon the property, in a contest between the claimants and the purchaser the latter failed to get any allowance for his improvements, by reason of their having been made with notice of the outstanding rights (*x*).

Where a mortgagee has sold and conveyed the mortgaged property in attempted pursuance of a power of sale in his mortgage, but by reason of some irregularity in proceedings, or for any other reason, a good title has not been made to the purchaser, the conveyance will operate as an assignment to the purchaser of all the mortgagee's interest in the mortgaged premises: thus, for example, if a mortgagee should enter into possession of the mortgaged premises, and retain the same in such a manner as to set the Statute of Limitations running in his favour as against the owner of the equity of redemption, or against any person who claimed the estate adversely to the mortgagee, and

(v) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

(w) *Carroll* v. *Robertson*, 15 Gr. 173. As to the mode of ascertaining the enhanced value, see *Fawcett* v. *Burwell*, 27 Gr. 445.

(x) *Russell* v. *Romanes*, 3 App. R. 635 and ee *Romanes* v. *Herns*, 22 Gr. 469.

before the lapse of the statutory period of limitation, the mortgagee should convey the mortgaged premises to a purchaser, such conveyance would pass to the purchaser the benefit of the possession so held by the mortgagee, and would avail the purchaser in same manner as if the possession throughout had been held by himself (*y*).

When the purchaser is by the terms of the power absolved from inquiring whether the right to exercise the power has arisen, he cannot in the absence of fraud or collusion be held bound to enquire what steps have been antecedently taken for the purpose of promoting the sale (*z*); but although he is not bound under such a power to make inquiries, yet such provision will not protect him if he do make inquiries and thereby or otherwise acquire knowledge of circumstances, sufficient, as against the mortgagee, to invalidate the sale, for he then becomes a party to the transaction (*a*). It was, moreover, found that a proviso absolving the purchaser from inquiring into the question of default or the regularity or propriety of the sale proceedings, did not always afford him the protection which it was intended he should have, for such a provision applies only to a case where there is a real contract, and not to a case where the power has not arisen, as, for example, where an absolute contract of sale was entered into before the period of notice required by the power had expired (*b*). It was held that in such a case the purchaser had to satisfy himself that all the conditions precedent to the exercise of the power had been performed so that there might be a contract in fact. This difficulty is now overcome by inserting a provision in the power, that upon any sale *purporting to be made in pursuance of the power*, the purchaser shall not be bound to enquire whether default has been made, or as to the propriety or expediency of the sale, and that notwithstanding any impropriety or irregularity in the sale proceedings, the

(*y*) *Bright* v. *Murray*, 1 O. R. 172.
(*z*) Per L. J. Turner, in *Davey* v. *Durrant*, 1 De G. & J. 558.
(*a*) *Jenkins* v. *Jones*, 2 Giff. 99; *Ford* v. *Heeley*, 3 Jur. N. S. 1111.
(*b*) *Ford* v. *Heeley*, 3 Jur. N. S. 1111.

same shall, as regards the purchaser, be taken to be within the power, and that the remedy of the mortgagor shall be in damages only. Such a provision will protect the purchaser so long as the mortgage remains undischarged, even though it may have been paid off (*c*).

Where the mortgage contains an absolute power of sale followed by a covenant by the mortgagee that he will not exercise the power without giving three months' previous notice, and a provision that the purchaser shall not be affected by express knowledge that such notice has not been given, and that the covenant shall operate only so as to give the mortgagor a right to an action for damages against the mortgagee, the purchaser will take a good title notwithstanding that he has actual knowledge that the mortgagee has failed to comply with his covenant (*d*).

There will be other cases in which the purchaser will be protected, even in the absence of an express provision in the power, upon the ground that the mortgagor is estopped from questioning the validity of the sale. Thus if those who are entitled to object stand by and allow the sale to be made without giving notice to the purchaser, they will be estopped from questioning the validity of the sale as against the purchaser, even though the mortgage had actually been paid off before the time of sale (*e*).

IX. Position of Mortgagee.

Where a mortgagee in possession sold the property under his power of sale, a day being fixed for the completion of the sale and for letting the purchaser into possession, and at the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent, it was held that the mort-

(c) *Dicker* v. *Angerstein*, 3 Chy. D. 600.

(d) *Prichard* v. *Wilson*, 3 N. R. 350; 10 Jur. N. S. 330; *Grant* v. *Canada Life Assurance Co.* 25 Gr. 256.

(e) *Warner* v. *Blakeman*, 36 Barb. (N. Y.) 501, 518. See *Pickard* v. *Sears*, 6 Ad. & E. 474; *Gregg* v. *Wells*, 10 Ad. & E. 97; *Swan* v. *North British Australasian Co.*, 2 H. & C. 181; *McArthur* v. *Egleson*, 43 U. C. R.; *Mason* v. *Bickle*, 2 App. R. (Ont.) 291; and see article commenting on these cases and others, 3 C. L. T. 223.

gagee could not be charged with an occupation rent for the interval during which the purchaser had been in possession before the appointed day. But *quære* whether in such a case he could be charged with wilful default in not requiring a rent from the purchaser (*f*)

If a mortgagee selling under his power of sale has reasonably expended money in permanent improvements on the property, he is entitled on *prima facie* evidence to that effect to an inquiry whether the outlay has increased the value of the property, and, if it has done so, he is entitled to be repaid his expenditure, so far as it has increased such value; and in such a case it is immaterial whether the mortgagor had notice of the expenditure or not, as notice to the mortgagor is material only when the expenditure is an unreasonable one, for the purpose of showing that he acquiesced in it (*g*).

X. Who may Purchase.

Many persons, by reason of the fiduciary position which they occupy, are unable to purchase for their own benefit (*h*). A mortgagee cannot, either directly or indirectly, become a purchaser at a sale under the power in his own mortgage, and his rights in this respect are in no way affected by R. S. O. cap. 99, sections 1 and 2 (*i*). If the mortgagee assume to purchase at such a sale he will have a redeemable interest only (*j*). Nor can an officer of a Building Society become a purchaser at a sale under a power in a mortgage given to the Society (*k*). Nor can the mortgagee's solicitor become such purchaser, either personally (*l*), or through his

(*f*) *Shepard* v. *Jones*, 21 Chy. D. 469.

(*g*) *Ibid.*

(*h*) On the general question as to who may not purchase, see Dart. V. & P. (5th Ed.) 31 *et seq.*

(*i*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 421; *Re Bloye's Trust*, 1 Mac. & G. 488.

(*j*) *Spain* v. *Watt*, 16 Gr. 260.

(*k*) *Martinson* v. *Clowes*, 21 Chy. D. 857.

(*l*) *Ex p. Bennett*, 10 Ves. 381; *Ex p. James*, 10 Ves. 337; *Downes* v. *Grazebrook*, 3 Mer. 200; *Howard* v. *Harding*, 18 Gr. 181; *Martinson* v. *Clowes*, 21 Chy. D. 860.

clerk (*m*). Where a mortgagee's solicitor has in fact the conduct of the sale, although all the proceedings have been carried on in the name of another solicitor, yet a sale to the mortgagee's solicitor will be irregular and voidable, notwithstanding that it was not publicly known that he was the mortgagee's solicitor, and notwithstanding the fact that the sale was not damped by his connection with it. It is not necessary, in order to set aside the sale in such case, to show that there was anything wrong in the conduct of the sale, or that a greater price might have been obtained (*n*). Even the employment by the purchaser of a clerk of the mortgagee's solicitor to bid for him will invalidate the sale, and cause the purchaser to take a redeemable interest only (*o*), and *a fortiori* the clerk cannot purchase for his own benefit (*p*). So also where a purchaser at a mortgage sale expostulated with those who bid against him, informing them of his losses, and saying that therefore they ought not to bid, and rival bidders were thereby induced to withdraw, and he got the property at an undervalue, the sale was set aside at the suit of a person subsequently interested in the equity of redemption (*q*). The employment of a land agent by a puisne mortgagee to procure offers for a purchase or exchange of the mortgaged premises will, while such employment continues, prevent the land agent from purchasing the mortgaged premises for his own benefit at a sale by a prior mortgagee under his power, and if he so purchase at such sale he will hold the property as trustee for his principal (*r*).

(*m*) *Ellis* v. *Dellabough*, 15 Gr. 583.

(*n*) *Howard* v. *Harding*, 18 Gr. 181.

(*o*) *Parnell* v. *Tyler*, 2 L. J. Ch. N. S. 195.

(*p*) *Holiday* v. *Peters*, 28 Beav. 349. The headnote to this case is wrong; it states that it was a case of purchase by the clerk of the mortgagee's solicitor, while the fact is that it was a case where the clerk of the mortgagor's solicitor had the conduct of the mortgagor's business, and obtained his confidence, and in such connection received such information as induced him to purchase the mortgage in question at less than half of its face value; and under the circumstances it was held that he was not entitled to hold the mortgage for more than he paid for it.

(*q*) *Tenner* v. *Tucker*, 6 R. I. 551.

(*r*) *Thompson* v. *Holman*, 28 Gr. 35.

A second mortgagee may purchase at a sale by the first mortgagee under his power, and he will thereby acquire an irredeemable title (*s*); and the second mortgagee may, even after such purchase, collect from the mortgagor under the covenant for payment contained in the second mortgage the amount that is due thereunder, and the fact of his so doing will not prejudice the title of the second mortgagee to the property so acquired at the sale, and will not render his interest a redeemable one (*t*), and therein such a mortgagee acquiring title in such a way differs from a mortgagee acquiring title by foreclosure, for although the mortgagee after foreclosure may proceed against the mortgagor personally for the recovery of the mortgage money upon the covenants in the mortgage, his so doing will open the foreclosure and let the mortgagor in to redeem (*u*).

If a purchaser from a first mortgagee transfers his incompleted contract to the mortgagor, the latter cannot thereby defeat the title of a second mortgagee (*v*). What would be the effect in such a case, if the first mortgagee sold to a stranger, and the mortgagor then purchased from that stranger, has been treated as doubtful (*w*). In this Province the title acquired by the mortgagor in such a case would pass by estoppel to the second mortgagee to the extent of his interest (*x*).

XI. Effect of Invalid Sale.

An invalid sale under a power in a mortgage operates as an assignment of the mortgage, and the sale will be set aside only upon payment to the purchaser of the amount due under the mortgage (*y*).

(*s*) *Shaw* v. *Bunny*, 33 Beav. 494, affirmed on appeal, 2 De G. J. & S. 468; *Kirkwood* v. *Thompson*, 2 Hem. & M. 392, affirmed on appeal, 2 De G. J. & S. 613; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 682. But see *Parkinson* v. *Hanbury*, 2 De G. J. & S. 450.

(*t*) See judgment of Armour, J., in *Harron* v. *Yemen*, 3 O. R. 133.

(*u*) *Munsen* v *Hauss*, 22 Gr. 279.

(*v*) *Otter* v. *Lord Vaux*, 2 K. & J. 650, affirmed on appeal, 6 De G. M. & G. 638, 644.

(*w*) *Ibid.*

(*x*) *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 564, 584.

(*y*) *Burns* v. *Thayer*, 115 Mass. 89; *Brown* v. *Smith*, 116 Mass. 108; *Robinson* v. *Ryan*, 25 N. Y. 320.

Where the mortgagee is indirectly a purchaser under a power in his own mortgage, the sale is not void but merely voidable. The title passes, and may be conveyed to a purchaser for value without notice (*z*).

A mortgagee or other person who is precluded from purchasing by reason of his fiduciary position, will, as to those whose interests are affected by the sale, become a trustee of all the interest acquired by him over and above the mortgage debt, and "he may on the requisition of any of his *cestuis que trustent*—including in this general term all persons interested in the estate before the sale, and their representatives—be compelled:—

1stly. To reconvey the estate, supposing he have not sold it;

Or *2ndly.* To let it be put up for sale, and to reconvey to another purchaser, if a better can be found; but if not, to keep it;

Or *3rdly.* If he have resold it at a profit, to account for such profit" (*a*).

Such an extensive measure of relief will apparently be granted to the mortgagor and those claiming through him in case only that there has been gross misconduct on the part of the purchaser, and it has been held that if the mortgagor be driven to his action it must be an action to redeem, and it cannot be maintained for the mere purpose of setting aside the sale (*b*).

Where a sale is open to objection on the ground of irregularity or misconduct, the objection will be waived unless the right to redeem be asserted within a reasonable time (*c*).

(*z*) *Burns* v. *Thayer*, 115 Mass. 89.

(*a*) Dart. V. & P. (5th Ed.) 45, where the authorities are collected. As to the cases in which *cestuis que trustent* may confirm the voidable purchase, see Dart V. & P. 49.

(*b*) *Goldsmith* v. *Osborne*, 1 Edw. Chy. (N. Y.) 560; but see and consider *Morrison* v. *Nevin*, 5 Gr. 577, and *Moore* v. *Hobson*, 14 Gr. 703.

(*c*) *Learner* v. *Foster*, 117 Mass. 89; *Hamilton* v. *Lubukee*, 51 Ill. 415; but see *Robertson* v. *Norris*, 1 Giff. 421; and see Dart V. & P. (5th Ed.) 48 and 49, for a collection of the authorities.

The burden of proof as to the regularity of a sale rests on those who support the sale whether they be the original purchasers or derive title through them (*d*), but if the sale be challenged, not on the ground of irregularity in proceedings but because of alleged fraud or collusion between the seller and the buyer, the onus will lie on the party making the charge (*e*).

The purchaser is of course entitled to the benefit of any legal presumption that may arise in his favour; thus where there was a power to be exercised upon notice in writing to the mortgagor, his heirs, executors, administrators and assigns, or upon causing such notice in writing to be left at his or their usual or last known place of abode, it was held that it was *prima facie* sufficient to show that the notice was posted on the door of the last known residence of the mortgagor, and that it was not necessary to show that he was then alive, as the presumption is that life continues, and the onus therefore lay on those who questioned the sale to show that anything more should have been done (*f*).

Where a sale had under a power is set aside, the power is not thereby exhausted, and it may be exercised again (*g*).

Where the power of sale has been irregularly exercised, the person injured thereby may recover damages against the person guilty of the irregularity (*h*).

XII. Appropriation of Proceeds of Sale, and Disposition of Surplus.

A mortgagee who sells part of the mortgaged premises under a power in his mortgage must apply the proceeds of sale in payment of the overdue interest and costs, and must then pay the balance to the mortgagor or those claiming under him, or apply it in reduction of the principal money

(*d*) *Bartlett* v. *Jull*, 28 Gr. 140; *Gibson* v. *Jones*, 5 Leigh (Va.) 370. But as to burden of proof in case of remote purchasers, see *Hamilton* v. *Lubukee*, 51 Ill. 415.

(*e*) *Bush* v. *Sherman*, 80 Ill. 160.

(*f*) *Major* v. *Ward*, 5 Hare 598.

(*g*) *Stockpole* v. *Robbins*, 47 Barb. (N. Y.) 212.

(*h*) *Hoole* v. *Smith*, 17 Chy. D. 434.

due on the mortgage; and the same rule applies where two distinct mortgages by the same mortgagor are held by the same person who sells one of the mortgaged estates (*i*).

It is the duty of the mortgagee to pay over the surplus that may arise on a sale to the mortgagor or those claiming under him, or to distribute it among those claiming under the mortgagor according to their respective priorities, but in making such distribution the mortgagee must have notice of the various claims to the surplus or of the incumbrances upon which they are founded, or he will not be liable for not applying the surplus in payment thereof (*j*).

All liens take priority with respect to the surplus in the same order and with the same effect as they bound the premises before the sale, that is, the surplus should be applied according to the rights of the parties as they existed before the real estate was turned into money (*k*).

And where a mortgagor and a first mortgagee concurred in making a sale which realized a surplus, and such surplus was paid over to the mortgagor, it was held in an action by a second mortgagee against the first mortgagee, that the latter was bound to account to the second mortgagee for the amount of such surplus (*l*).

A judgment creditor of a third mortgagee having obtained a garnishing order against the first mortgagee after a sale by the latter under a power in his mortgage, was held entitled to attach the surplus in the hands of such first mortgagee in a case where such surplus was held in trust for the mortgagor, his executors, administrators and assigns (*m*).

(*i*) *Thompson* v. *Hudson*, L. R. 10 Eq. 497.

(*j*) *McLean* v. *Lafayette*, 4 McLean, 430.

(*k*) *Markey* v. *Langley*, 92 U. S. Sup. Ct. Rep. 155; *Nichol* v. *Ewin*, 7 P. R. 331; *Astor* v. *Miller*, 2 Paige (N. Y.) 68; *Bartlett* v. *Gale*, 4 Paige (N. Y.) 504.

(*l*) *West London Commercial Bank* v. *Reliance Permanent Building Society*, 27 Chy. D. 187.

(*m*) *Chatterton* v. *Watney*, 16 Chy. D. 378. See same case in appeal, 17 Chy. D. 259 as to the right to reach a surplus by *garnishing order against the mortgagor*. As to priority between a garnishing order against the surplus and an execution against the mortgagor which was in the Sheriff's hands prior to the sale, see *McKay* v. *Mitchell*, 6 U. C. L. J. 41, as explained in *Nichol* v. *Ewin*, 7 P. R. 331.

It has been held in an American case that a puisne incumbrancer, who is entitled to notice of sale but has received none, will not be entitled to any of the surplus arising on a sale under the power in a prior mortgage, as the land is not by such a sale discharged from his lien (*n*).

Where a mortgage deed contains a power of sale with a direction that the surplus produce of a sale shall be paid to the mortgagor, his *executors and administrators*, if a sale take place in the lifetime of the mortgagor, the surplus will be personalty in his hands, but if the sale take place after his death, the surplus will descend as realty (*o*) unless there be a clear intention expressed in the power to convert the property out and out (*p*).

It is enacted by 42 Vict. (Ont.) cap. 22, that no bar of dower contained in a mortgage shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee, and that in the event of the sale of the land comprised in the mortgage, under a power therein contained, the wife of the mortgagor, who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, to the same extent as she would have been entitled to dower in the said lands had the same not been sold. This statute is not retrospective and it therefore applies to such mortgages only as have been executed since the 11th of March, 1879 (*q*). This is not merely a legislative declaration of the law as laid down in *Robertson* v. *Robertson* (*r*) since the Act recognizes the wife's *inchoate right to dower in an equitable estate* (*s*). The effect of this statute is to give the wife dower of the surplus, calculated not merely on the amount of such surplus, but calculated on the whole amount of such purchase money.

(*n*) *Winslow* v. *McCall*, 32 Barb. (N. Y.) 241.

(*o*) *Wright* v. *Rose*, 2 Sim. and St. 323; *Bourne* v. *Bourne*, 2 Hare, 35.

(*p*) *Van* v. *Barret*, 19 Ves. 102.

(*q*) *Martindale* v. *Clarkson*, 6 App. R. 1.

(*r*) 25 Gr. 586.

(*s*) *Per* Patterson, J., in *Martindale* v. *Clarkson*, 6 App. R. 6.

When a mortgagor would be barred by the Statute of Limitations from bringing an action for redemption or for recovery of the lands, he will also be barred from recovering any surplus which may remain in the hands of the mortgagee who has exercised his power of sale (*t*). A mortgagee does not hold such a surplus upon an express trust within the meaning of that term as used in the well known rule that no lapse of time will bar the right of action against a trustee in respect of an express trust (*u*); the right of action against a mortgagee to recover such a surplus will be lost in six years from the ascertaining of the surplus (*v*), and this will be the case even though the mortgage be given in the form of a trust for sale, for such a trust will be treated as an ordinary mortgage and not as an express trust such as will prevent the running of the Statute of Limitations (*w*).

If the surplus lie unproductive in the hands of the mortgagee, pending the ascertaining of the rights of adverse claimants, the mortgagee will not be charged with interest thereon (*x*).

A mortgagee holding a surplus to which adverse claims are made, may properly pay the same into court under the provisions of the Imperial Trustees Relief Act (*y*).

Provision is made by 42 Vict. (Ont.), cap. 22, sec. 3, for payment into court of a surplus out of which a married woman is dowable under that statute.

A. H. MARSH.

(*t*) *Re Alison*, 11 Chy. D. 254.

(*u*) *Banner* v. *Benidge*, 18 Chy. D. 254.

(*v*) *Ibid.*

(*w*) *Re Alison*, 11 Chy. D. 284.

(*x*) *Matheson* v. *Clark*, 4 W. R. 30.

(*y*) *Re Kingsland*, 15 Can. L. J. 85 and 8 P. R. 77; *Re Keeler's Mortgage Trusts*, 1 N. R. 44. *The Western Canada Loan and Saving Co.* v. *Court*, 25 Gr. 151, appears to be adverse to this proposition, but see that case explained in *Re Kingsland*, 15 Can. L. J. 85.

EDITORIAL REVIEW.

Mr. Justice Killam.

Manitoba has long desired a home-made Judge, so to speak. Cities and Queen's Counsel have been produced more rapidly on Her soil than on any other soil in North America. And She was naturally ambitious of producing a Judge. Mr. Killam, though educated in Ontario, belongs to the Manitoban family of lawyers, and is a credit to both Provinces. His reputation as a student in Ontario, for learning and uprightness, was good. As a practitioner in Ontario he promised success; in Manitoba he attained it. Let us wish him all success in his judicial career; and may Manitoba be proud of Her Judge! His name, at least, will be a terror to criminals.

An Agent's Horse-power.

One may pay too dearly for terseness. Without intending the least disparagement to the accomplished Editor of the American Reports, we think he sometimes makes a sacrifice in order to be brief. For instance, the following headnote: "An agent to travel and sell steam engines has implied power to hire horses," appears to, but does not in fact, state a bald proposition of law. Nor does it convey the *ratio decidendi*. Perhaps, though, it is a joke; for our learned friend is somewhat of a humourist. There may be some subtle connection between the horse-power of the engines and that of the agent.

The Late Mr. Justice Smith.

After a short period of labour on the Manitoba Bench, Mr. Justice Smith succumbed to the disease against which he struggled so manfully. His judicial record, though short,

is by all report a good one. He was always ready for work; he always understood his work; and he always did his work, until he stepped down from the Bench to enter the hospital.

Senator Gowan.

A better appointment to the Senate than that of Judge Gowan could not have been made. If such appointments were the rule we should never hear complaints of our Upper House. He brings to the Senate excellent abilities, deep learning, great experience, and an unimpeachable character.

Lawyers in Parliament.

A newspaper classifies the members of the Canadian House of Commons by their occupations. Out of a House of 213 members, 54 are lawyers. "Gentlemen" to the number of 14 are not included.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

In re THE LIQUOR LICENSE ACT, 1883, AND AMENDING ACT.

Constitutional Law—Regulation of liquor traffic.

Upon a special case submitted to the Court,

Held, that the Liquor License Act, 1883, and the Act amending the same, 47 Vict. cap. 32, are *ultra vires* of the Parliament of Canada, except in so far as the said Acts respectively purport to legislate respecting those licenses mentioned in section 7 of the Liquor License Act, 1883, which are therein denominated vessel licenses and wholesale licenses, and except in so far as the said Acts respectively relate to carrying into effect the provisions of the Canada Temperance Act, 1878.

Per Henry, J. The said Acts are *ultra vires* in every respect.

ONTARIO.]

MERCHANTS BANK OF CANADA v. KEEFER.

Will, construction of—Contingent interest.

T. McK., a testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise as follows:—"In trust also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, etc., which I hereby devise to him, his heirs, and assigns to and for his and their own use for ever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises

"in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; provided always, that in the event of any children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:— "All other my lands, tenements, houses, hereditaments and real estate, etc."

Held, Ritchie, C.J., and Fournier, J., dissenting, reversing the judgment of the Court below, that the interest devised to Thomas was contingent upon surviving his mother.

Per Strong, J. As a devise of *other* lands includes undisposed of interests in lands, in which partial interests, or contingent interests which have failed, have been previously given, the devise of lot number 1 at Thomas' death formed part of the residuary lands of the estate, subject to the provisions as to survivorship and substitution mentioned in the will. Mrs. E. Keefer, one of the testator's children, having died in the lifetime of her mother, the substitution in favour of her children was restricted to the children who survived their mother, and they became entitled absolutely among themselves as tenants in common, to an equitable estate in fee simple in remainder expectant on the death or second marriage of the testator's widow, in one undivided fourth part of said lot No. 1. And upon the death of the said testator's widow, the testator's children, Annie Keefer, Christine McKay and J. Clark, the three surviving daughters of the testator, became entitled absolutely to an equitable estate in the remaining three undivided fourth parts of lot 1 as tenants in common in fee simple.

C. Robinson, *Q.C.*, and *Gormully*, for the appellants.

S. H. Blake, *Q.C.*, and *McIntyre* and *Black*, for the respondents.

PETERKIN v. McFARLANE *et al.*

Purchase with agreement to resell—Registry Act—Notice.

P. filed a bill against McF. and others claiming a right to redeem a certain piece of land conveyed absolutely in form to McF., and subsequently resold by McF. to McR., and by the latter to B. By his answer to this bill B. admitted that the right of redemption had been given, and by amended answer set up the Registry Act, and a *bona fide* purchase for value without notice. The learned Judge who tried the case found that the redeemable character of the transaction was admitted by the pleadings and proved, and that, as a matter of fact, the evidence established clearly that the parties had actual notice of P.'s right of redemption: 1 C. L. T. 443. On appeal to the Court of Appeal, that Court was equally divided,

and the appeal was therefore dismissed and the judgment of the Court below was affirmed : 4 C. L. T. 118.

On appeal to this Court it was

Held, Gwynne, J., dissenting, that there was evidence to justify the conclusion arrived at by the Judge of first instance, that the parties had actual notice, and therefore the registry act did not defeat P.'s right to redeem the property.

Moss, Q.C., and *Scane*, for the appellants.

C. R. Atkinson, for the respondent.

PECK v. POWELL.

POWELL v. PECK.

Sale of patent—Specific performance—Renewal.

By an agreement dated 1st June, 1877, Powell undertook to assign his interest in his pump patents to Peck and others for the counties of York, Halton, Peel, Simcoe, and Ontario, and by deed of same date he granted, sold, and set over to Peck and others "all the right, title and interest, which I have in the said invention, as secured to me by said Letters Patent, for, to, and in the said limits of the county of York, etc.;" *habendum* for the full term for which the said Letters Patent were granted. The deed was not completely executed till the 23rd June, 1877, and the patent expired on the 19th July, 1877. Powell renewed the patent in his own name for a further term. On a bill fyled by Powell, asking for a decree for payment of purchase money secured by a mortgage, or in default for a sale of the lands mortgaged, and on another bill fyled by Peck and others, praying that Powell might be ordered to transfer to them the patent for the residue of the renewed term of the patent, and that Powell be restrained from attempting to levy the purchase money until he should have done so,

Held, varying the judgments of the Court below, 26 Gr. 322 ; 3 C. L. T. 451, that Powell had parted with all interest so far as the five counties were concerned, and that at the time of the expiration of the patent Peck and others were the legal holders under the statute of the patent for those counties ; and that Peck and others were now as such, entitled to a decree affirming their right to the patent in the five counties to the full end of the further term granted to Powell ; and that as regards Powell he was entitled to recover on his mortgage.

Hector Cameron, Q.C., and *W. Fitzgerald*, for the appellants.

McCarthy, Q.C., and *Moss, Q.C.*, for the respondent.

MOFFATT v. THE MERCHANTS BANK OF CANADA.

Deed, Construction of—Misrepresentation.

G. M., a man of education and well acquainted with commercial business, executed a certain agreement and bond to pay certain sums of money in certain events to the Merchants Bank of Canada, the agreement reciting, *inter alia*, that, in consideration of the security the Merchants Bank of Canada had agreed to make further advances to the firm of M. Bros. & Co., joint obligors and parties to the agreement, and that the agreement was executed to secure the Merchants Bank of Canada, in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in a mortgage, and to secure the Bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness then the bond and agreement should become wholly void. In a suit brought upon the agreement against G. M., alleging a deficiency in the assets of the firm, and indebtedness to the Bank, G. M. pleaded that the agreement had been executed by him on representations made to him by one of his co-obligors, that it was to secure the Bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over-valuation of the property embraced in the mortgage and not otherwise.

Held, affirming the judgment of the Court below, Gwynne, J., dissenting, that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect, viz., that the security was given to cover any possible ultimate loss there might be on the account of the firm.

McCarthy, Q.C., and *J. H. Ferguson*, for the appellants.

C. Robinson, Q.C., and *J. F. Smith*, for the respondents.

WHITE v. NELLES.

Possession fraudulently obtained—Estoppel—Tax sale—33 Vict. cap. 33 (O.)

N. was assignee in insolvency of H., who bought from the purchaser at a tax sale the north part of a lot which was assessed as lot 1 in one survey, and as lot 4 in another, of 100 acres more or less, and which had been assessed variously as "number one, N. half, etc.," "number one, N. part, etc.," and "broken lots one and four." H. leased to T., and put him in possession, and had some small buildings put on the land. Subsequently, O., one of the defendants, went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, was owner in fee simple of the land, and claimed title as his tenant. W. by his answer adopted O.'s possession and claimed under conveyance from the Crown, but failed to prove his title.

Held, affirming the judgment of the Court below, that the possession of O. having been fraudulently obtained, the defendants were estopped from disputing the plaintiff's title.

Per Gwynne, J. As the defendants had failed to prove that the taxes had been paid before the sale, the Ontario Statute 33 Vict. cap. 23, removed all errors and defects, if any there were, which would have enabled the true owner at the time of the sale to have avoided it, and, pursuant to the provisions of R. S. O. cap. 40, sec. 87, the plaintiff was entitled to recover possession of the land in question by virtue of the title asserted by him in his bill.

James Bethune, *Q.C.*, for the appellants.
S. H. Blake, *Q.C.*, for the respondent.

QUEBEC.]

SOULANGES ELECTION CASE.

CHOLETTE v. BAIN.

Dominion Elections Act, 1874, sec. 95—Intimidation—Undue influence—Conspiracy between deputy returning officer and respondent's agent—Conspiracy to mark ballots—Effect of—Election void.

In an election petition it was charged that the respondent personally, as well as acting by A. C. C., D. P. and others, his agents, did undertake and conspire to impede, prevent and otherwise interfere with the free exercise of the franchise of certain voters, and that in furtherance of a premeditated scheme, which the respondent and his agents well knew to be illegal, they did in fact so impede, prevent and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered capable of identification, and consequently void, whereby the franchise of these voters was unjustifiably interfered with. At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the Judge as having been guilty of corrupt practices, but had not been found guilty of such corrupt practices under sec. 104 of the Dominion Elections Act, 1874. At a public meeting before the electlon A. C. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him threatened them with punishment if they voted, and subsequently printed notices to the same effect were sent to these voters. On the polling day, D. P., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with A. C. C., and on his advice and in collusion with him marked the ballots of certain of these voters.

Held, that the election was void by reason of the attempted intimidation practised by A. C. C., the respondent's agent, and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of section 95 of the Dominion Elections Act of 1874, which are corrupt practices under section 98 of the said Act.

Geoffrion, *Q.C.*, and *Monk*, for the appellant.
Ouimet, *Q.C.*, and *Cornellier*, for the respondent.

MORSE v. MARTIN.

Trade mark—Infringement—Fraudulent imitation.

The proprietor of a trade mark registered it in Canada in 1879, and used it on an article of his manufacture styled "The Rising Sun Stove Polish." The mark in question consisted of a picture of a rising sun above a body of water, and across the picture the words "The Rising Sun Stove Polish" were printed. He sued one C. M. for damages for infringement of his trade mark. There was evidence that C. M. manufactured and sold in Canada a stove polish put up in packages bearing a picture of an orb, or sun, with the words "Sunbeam Stove Polish" printed thereon. One article was put up compact, and the other in powder; the packages were not alike in shape or colour; one was put in small oblong cubical blocks, in red wrappers, with the device of a well developed sun rising above a body of water, with two mountains in the foreground; whilst the other was put up in cylindrical tin boxes in yellow wrappers with a small star or sun about the centre of the label, and had printed on it the name of the manufacturer.

Held, affirming the judgment of the Court below, that the plaintiff had failed to prove that any fraudulent imitation of his trademark had been practised, or that one had been used having a resemblance to it calculated to deceive or mislead ordinary purchasers with ordinary caution.

Kerr, Q.C., for the appellant.
Robertson, Q.C., for the respondent.

STEVENS v. FISK.

Foreign divorce—Validity of, in Canada--Domicile—Married woman—Right to sue as a feme sole—Art. 14, C.C.P.—Comity of nations.

In 1871, the parties, F. and S., being native American citizens, were married in the State of New York where they then had their domicile. In 1872 they both came to Canada, and established their domicile at Montreal. At the time of the marriage, S., the appellant, was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband. In 1876, S. left her husband to return to the United States, and in 1880 she commenced a suit in the Supreme Court of New York against her husband for divorce for cause of adultery. Process was served upon F. at Montreal; and he appeared by attorney, and after proof had, a decree of divorce was pronounced. In an action brought by S., as a *feme sole*, against F. for an account of her fortune, she set forth the facts of the marriage and the divorce. At the trial it was proved that by the laws of the State of New York, the husband had no control over the separate property of his wife; that she continued to exercise her rights over her own property as if she were a *feme sole*.

Held, reversing the judgment of the Court below, Strong, J., dissenting (i) per Fournier, Henry and Gwynne, JJ., that it was not necessary for S.,

a foreigner, to obtain the authorization required by Art. 176 or 178, C.C., in order to sue, as in her own country such authorization is not necessary (Art. 14, C.C.P.); (ii) per Ritchie, C.J., and Henry and Gwynne, JJ., that F., having appeared before and submitted to the jurisdiction of the Supreme Court of New York, the matrimonial domicile of both parties, and that Court having, as appeared by the evidence, jurisdiction to entertain the suit, the decree of divorce obtained by S. was valid and binding on the parties here by comity of nations.

Laflamme, Q.C., and *Lafleur*, for the appellant.
Kerr, Q.C., for the respondent.

THE QUEBEC WAREHOUSE COMPANY v. THE TOWN OF LEVIS.

Constitutional law—44 & 45 Vict. cap. 40, sec. 2 (Que.)—Construction of—By-law—Ultra vires.

Under 44 & 45 Vict. cap. 40 (Que.), based on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the council of the town of Levis passed a by-law to pay to the Quebec Central Railway Co. the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the river St. Lawrence over and above $30,000. The appellants, being ratepayers of the town of Levis, and having an interest in the expenditure of the funds of the corporation, applied for and obtained an injunction to stay further proceedings on this by-law on the ground of its illegality. The proviso in sec. 2 of the 44 & 45 Vict. cap. 40, is as follows: —"Provided that, within thirty days of the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its valid guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right of way."

By the Acts of incorporation of the town of Levis no power or authority is given to the corporation to give such guarantee. The statute 44 & 45 Vict. cap. 40, was passed in the 30th June, 1881, and the by-law forming the guarantee was passed on the 27th of July following.

Held, reversing the judgment of the Court of Queen's Bench, that the Act in question, 44 & 45 Vict. cap. 40, did not give power to the corporation of the town of Levis to impose a burden upon the municipality, which was not authorized either by the Act of incorporation of the town of Levis or by some other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained.

Irvine, Q.C., for the appellants.
Languedoc, for the respondents.

SULTE v. THE CORPORATION OF THREE RIVERS.

Constitutional law—British North America Act—Liquor License Act, 1878, 41 Vict. cap. 3 (Que.)—Powers of Local Legislature to regulate sale of intoxicating liquor—Delegation of power to municipal corporations—41 Vict. cap. 3, secs. 36, 37, 255, construction of—By-law, validity of—20 Vict. cap. 129, and 38 Vict. cap. 76, sec. 75.

By a by-law passed by the corporation of the city of Three Rivers on the 3rd April, 1877, under the authority conferred upon them by the charter of the city, 20 Vict. cap. 129, and by 38 Vict. cap. 76, sec. 75, a license fee of $200 was imposed on persons who were desirous of obtaining a license to keep a saloon and sell intoxicating liquor. By sec. 36, 41 Vict. cap. 3 (Que.), it is enacted that "on each confirmation of a certificate for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of $8 is paid to the corporation of each of those cities, and to other corporations for the same object, within the limits of their jurisdiction, a sum not exceeding $20 may be demanded." Sec. 37 enacts:—"The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws." Sec. 255 provides that "the dispositions of this Act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their charter and by-laws, and shall not have the effect of abrogating or repealing the same."

On the 31st March, 1880, S. (appellant) filed with the council of the corporation of Three Rivers the certificate required by sec. 11 of 41 Vict. cap. 3 (Que.), and, on their refusal to confirm the certificate, except upon payment of the sum of $200 imposed by the by-law of the 7th April, 1877, he petitioned for a writ of mandamus to declare the by-law null, and that the officials of the council be ordered to sign and deliver the certificate in question.

Held, following *Regina* v. *Hodge*, 9 App. Ca. 117, affirming the judgment of the Court below, (i) that the provisions of the Liquor License Act, 1878 (Que.) are *intra vires* of the Legislature of the Province of Quebec; (ii) that the proviso of sec. 37 excepts the by-law made on the 7th April, 1877 from the provision of sec. 36, and that the powers which the corporation of Three Rivers has to impose License fees on the sale of intoxicating liquors, by virtue of 20 Vict. cap. 104, and 38 Vict. cap. 76, have not been repealed by "The Liquor License Act of 1878."

Doutre, Q.C., for the appellant.
Denoncourt, Q.C., for the respondents.

LA COMPAGNIE DE VILLAS DU CAP GIBRALTAR v. HUGHES.

Building Society—Purchase of land—Intra vires—C. S. L. C. cap 69.

La Compagnie de Villas, a building society incorporated under C. S. L. C. cap. 69, by its by-laws, on the 21st August, 1874, declared that the principal object of the society was to purchase building lots, and to build

on such lots cottages costing about $1,000 each for every one of its members. In order to attain its object, the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-law, and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages were built and drawn by lots for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, borrowed money from the D. B. Society (respondents), and transferred to them as collateral security the moneys due them by the appellants by virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement, *acte de reglement de compte*, was executed between the two companies, upon which was based the suit by H., the respondent, against the appellant company. The question argued on this appeal was whether the purchase of the lots and contract for building entered into by the directors was *ultra vires* of the appellant company.

Held, affirming the judgment of the Court below, Strong and Gwynne, JJ., dissenting, that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its rules, it was not *ultra vires*.

Beique, for the appellant.
Globensky, for the respondents.

NEW BRUNSWICK]

THE PROVIDENCE WASHINTON INS. CO. v. CHAPMAN.

Marine insurance—Policy of foreign corporation—Agent—Proof of agency—Con. Stat. cap. 46, sec. 16 — Prior insurance — "Premises hereby assured" — Insurance on freight — Warranted not to load more than registered tonnage with stone or ore without consent of agent — Verbal consent of agent.

A policy of insurance of a foreign corporation declared that it should not be valid unless countersigned by R. the company's agent at St. John, N.B. In an action on the policy, proof that it was countersigned by R. as agent, and issued to the plaintiff on his application, and that he had previously dealt with R. as agent of the company, and received a policy from him, purporting to have been issued by the company and countersigned by R. as such agent was

Held, sufficient evidence under the C. S. N. B. cap. 46, sec. 16, to prove that R. was the accredited agent of the company, and that the policy was executed by them; affirming the judgment of the Court below, 4 C.L.T. 295.

Plaintiff insured $5,000 on a vessel valued in the policy at $50,000. The policy stipulated that if the assured had made any prior insurance,

the underwriters should be answerable only for so much as such prior insurance was deficient towards fully covering the premises thereby insured. The plaintiff's interest in the vessel amounted to $15,000, and he had prior insurance to the extent of $5,350; there was also insurance by other persons, on the freight and disbursements of the vessel, and on advances made to the plaintiff.

Held, (i) that the words "premises hereby assured," meant the plaintiff's interest in the vessel; and that, as the value of his interest exceeded the the amounts both of the prior insurance and of the sum insured by the policy sued on, he was entitled to recover the whole of the latter sum. (ii) That the insurance on freight, &c., did not come within the prior insurance clause in the policy.

By the terms of a policy of insurance, a vessel was warranted not to load more than her registered tonnage "with stone, marble, lead, ores, or bricks" without the consent of the agent of the underwriters. The vessel was loaded with phosphate rock beyond her registered tonnage.

Held, affirming the judgment of the Court below, that a verbal consent of the agent to load down to the load line mark the same as if loading coal was sufficient to allow insured to load beyond the registered tonnage of the vessel.

Weldon, Q.C., and *Palmer*, for the appellants.
Dr. Barker, Q.C., for the respondent.

LEWIN v. WILSON.

Statute of Limitations—Con. Stat. N. B. cap. 84, sec. 40, and cap. 85, secs. 1 and 6—Covenant in mortgage deed—Payment by co-obligor.

J. H. borrowed $4,000 from M. C. on the 27th September, 1850, at which date J. H. and J. W. gave their joint and several bonds to M. C., conditioned for the repayment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the $4,000, two separate mortgages were given, one by J. H. and wife, on H.'s wife's property, and one by J. W. and wife, on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon repayment of the sum of £1,000 and interest by J. W. and J. H. or either of them, their or either of their heirs, executors, etc., according to the condition of the bond above-mentioned, then the said mortgage should be void. A similar provision was inserted in the mortgage from J. H. The bond and mortgages were assigned to the appellants in 1870, and the principal money was never paid. J. W. died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above-mentioned mortgage, to G. W. (one of the respondents) and others. J. W. in his lifetime was, and since his death, the respondents have been in possession of the premises so mortgaged by J. W., and neither J. W. nor any person claiming by, through or under him, ever paid any interest on the bond and

mortgage, nor gave any acknowledgment in writing of the title of M. C. or her assigns. J. H., the co-obligor, paid interest on the bond from its date to 27th March, 1870. On the 20th January, 1881, under Con. Stat. N. B. cap. 40, a suit of foreclosure and sale of the premises mortgaged by J. W. was commenced in the Supreme Court of New Brunswick in Equity, and the Court gave judgment for the respondents.

Held, affirming the judgment of the Court below, Strong, J., dissenting, (i) that all liability of J. W.'s personal representatives, and of his heirs and devisees, to any action whatever upon the bond, was barred by secs. 1 and 6 of cap. 85, Con. Stat. N. B., although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute, 3 & 4 Wm. IV. cap. 42. (ii) That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in Real Actions, Con. Stat. N. B. cap. 34, sec. 40.

Per Gwynne, J. The only person by whom a payment can be made, or an acknowledgment in writing signed, so as to stay the running of the Statute of Limitations to a point which being reached frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.'s mortgage.

Weldon, *Q.C.*, for the appellants.
Dr. Tuck, *Q.C.*, for the respondents.

MANITOBA]

LYNCH v. WOOD.

Vendor and Purchaser—Agreement, construction of—Consideration—Second Mortgage.

W. agreed to sell to L., and L. agreed to purchase, a messuage and land for $4,800, and W. accepted in part payment a mortgage on another parcel for the sum of $2,500. The mortgage on its face appeared to be a first mortgage, but it was in realty, subsequent to another mortgage for a large amount. In an action on the agreement for the purchase of the said land, it was admitted that the mortgage was not a first mortgage upon the land described in it, and that nothing was said upon the subject, and that W. would be damaged by having to take the mortgage as a second mortgage, if he was entitled to a first mortgage.

Held, affirming the judgment of the Court below that W. was entitled to a good and valid mortgage and that on the admission in evidence he was entitled to a verdict.

McCarthy, *Q.C.*, for the appellant.
Christie, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, JANUARY, 1885.

EDDY v. CUNNINGHAM.

Estoppel—Statute of Limitations.

In 1858, A. conveyed land to B., the consideration being $400. The conveyance was not registered, but was delivered to C. to hold until the consideration was paid. B. secured possession of this conveyance from C. by deceit, and in November, 1866, conveyed the land to D., reserving a life estate to A., D. being well aware that the consideration money had not been paid to A. In December, 1866, B. executed another conveyance to D., omitting the reservation of the life estate to A. In 1876, D. conveyed to his son E., the plaintiff, a large parcel of land, including the land in question. A. continued in possession of the land in question until his death in April, 1884, having, shortly before his death, conveyed the land to the defendant, who was his daughter. D. and E. attempted, upon several occasions, and by different means, to dispossess A.

Held, that whatever claim D. or E. might have had to recover the land upon payment of the $400 to A., and whatever protection they might have against the Statute of Limitations if they had treated A. as tenant for life under the reservation in his favour, they had lost by their adverse conduct in refusing to treat A. as tenant for life; and that they were now barred by lapse of time.

SEYMOUR v. LYNCH.

Lease, construction of—License.

In an indenture under the Short Forms of Leases Act, the plaintiff was described as lessor, and P. and L. as lessees; the operative part being that the lessor did "give, grant demise and lease * * * the exclusive right, liberty and privilege of entering at all times for * * in, and upon, that certain tract of land situated * * reserving that portion thereof occupied, or hereafter to be occupied, as a roadway, and with agents to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises." The lessees were "also to pay taxes, and do statute labour assessed upon the premises;" and they were "not to allow any manufacture or traffic in intoxicating drinks upon the

said premises, or carry on any business that may be deemed a nuisance thereupon."

Held, reversing the judgment of Patterson, J. A., a lease, and not a mere license.

HOWELL v. ARMOUR.

Action against Justice of the Peace—Notice of action and statement of claim, defect in—Failure of action.

In an action against a Justice of the Peace and constable for having issued a search warrant against the plaintiff for having and concealing a colt belonging to another,

Held, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the Justice had jurisdiction, were defective for want of the allegation that the Justice acted "maliciously and without reasonable and probable cause;" and the statement of claim was defective in not showing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or until it was established that, for some sufficient reason, no trial could be had; and the statement of claim here did not allege that the property had not been stolen.

STILLWELL v. REAME.

Libel—Separation of jury after the charge—Refusal to interfere with verdict.

In an action of libel, the jury, after having been charged, were, with the consent of counsel for some of the defendants, and in the absence of counsel for another defendant, allowed to separate, and before re-assembling had the opportunity of reading an article in the "Mail" newspaper reflecting upon the case.

The Court, notwithstanding, refused to interfere with their verdict in the plaintiff's favour.

KINVER v. PHŒNIX LODGE.

Trespass to person—Corporation—Initiation of member—Liability of corporation.

The plaintiff, during his initiation as a member of defendants' lodge, was injured through the rough usage of some of the members.

Held, that the corporation were liable in damages for the injuries sustained by him.

REGINA v. BAIL.

Forgery—Alteration of Dominion note—31 Vict. cap 46, sec. 2—32 & 33 Vict. cap. 9 and 10.

Held, that the alteration of a two dollar Dominion note, to one of the denomination of twenty dollars, such alteration consisting in placing a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted.

ROBINS v. THE CORPORATION OF THE VILLAGE OF BROCKTON.

Municipal corporation—Contract not under seal—Liability of corporation.

The plaintiff was appointed by the defendants to audit their books. The appointment was not under seal.

Held, Wilson, C.J., dissenting, that the defendants were liable for the work done.

DONELLY v. HALL.

Sheriff—False return—Chattel mortgage, description in—Liability of sheriff.

In an action against a sheriff for a false return, the defence was that the goods seized and subsequently abandoned by him, and which were on Bald Lake, Buckhorn Lake, Sandy Creek, and Swan River, were covered by a chattel mortgage to a Bank, the goods in which were described as being "now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River, and the shore adjacent thereto." The evidence showed that the former waters were well known as such, and as distinct from, and forming no part of the latter; and that no part of the goods seized had ever been in and upon the latter.

Held, that the words in the mortgage "now in and upon" expressly limited the goods described thereby to those goods which were then upon the latter waters, and the shore, and adjacent thereto, and could not include the goods seized on the former, which were separate and distinct waters, and universally recognized as such in the locality; Scugog River, Sturgeon Lake, Pigeon Lake, Buckhorn Lake, and Mud Lake, having all received legislative recognition as such in C. S. U. C. cap. 28, *Sched. A.*; and therefore, that the defendant was liable.

GIBSON v. McDONALD.

Temporary Judicial District of Nipissing—Appeal to Quarter Sessions of Renfrew—Grouping Clauses Act, R. S. O. cap. 42.

Held, that there is no appeal from the temporary judicial district of Nipissing to the Quarter Sessions of the County of Renfrew, the county nearest to Nipissing.

Held, also, that the Judge of the County Court of the County of Lanark could not preside at the Renfrew Sessions and try such appeal, notwithstanding R. S. O. cap. 42, under which these two counties are grouped together for judicial purposes.

McLAREN v. MARKS.

Rules 107, 108—Third parties—Appeal from Judge—Rule 414.

In an action for the non-delivery of coal, one of the defendants gave notice to S. and M. under the first part of rules 107 and 108 of the action, and that he claimed contribution from them to the extent of one-half of any sum recovered against him, on the ground that they were co-partners in the transaction, etc. S. and M. appeared to this notice, and the Master in Chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant.

Held, on appeal from the order of Osler, J. A., setting aside the order of the Master, that the latter order had been properly made.

The decision appealed from was given upon the 14th, and the notice of appeal upon the 26th November; the first day of Michaelmas Sittings being the 19th November.

Semble, that this was an appeal from a Judge, and not a substantive motion to rescind his order, and, if so, the appeal was too late under rule 414; but

Held, even so, that the Court would extend the time, as the merits were with the appellant.

FEDERAL BANK v. NORTHWOOD.

Promissory note by member of partnership—Accommodation endorsement of firm name—Liability of firm.

The plaintiffs discounted a promissory note made by N. (one of the members of a firm of N. & Co.), upon which N. endorsed his firm's name for his own accommodation, of which the plaintiffs had knowledge.

Held, that they could not recover thereon from N. & Co.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 3RD JANUARY, 1885.

Re McCALLUM v. GRACEY.

Prohibition—Division Court—Cause of action—43 Vict. cap. 8, secs. 8, 12.

A promissory note was dated at Milton, in the County of Halton, 17th September, 1877, and was for $100 payable three months after date at Milton, with interest at 8 per cent. per annum.

The maker died in the County of Essex long after the maturity of the note; her will was proved in Essex, and the defendants, the executors of the maker, at the time of the action resided in that County.

Held, that the death of the maker, the circumstance of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action, which was complete before the granting of the probate, and therefore that the defendants were properly sued in the first Division Court of Halton, in which Milton is situate.

Held, also, that the Court sought to be prohibited had jurisdiction by virtue of 43 Vict. cap. 8, secs. 8 and 12.

Aylesworth, for the motion.

Allan Cassels, contra.

CHANCERY DIVISION.

[The Divisional Court, 15th September, 1884.

WRIGHT v. LEYS.

Assignment of Mortgage—Purchase in trust for mortgagor—Statute of Frauds—Notice.

The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C., with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying such sum as C. should pay for the mortgage and a certain additional sum for C.'s services.

Held, that the above agreement fell within the Statute of Frauds, and should be evidenced by writing.

Held, also, that even if this were not so, L. could not be affected by the agreement, having purchased without notice of it.

Read, *Q.C.*, and *W. Read*, for the appellant.

[18th December, 1884.

LONDON & CAN. L. & A. CO. v. WALLACE.

Will, construction of—Direction to carry on testator's business—Power to mortgage.

The judgment of Ferguson, J., 4 C. L. T. 196, was reversed, the Court being of opinion that the plaintiffs had no notice of the misapplication of the moneys lent by them to the defendants.

Arnoldi, for the plaintiffs.

Moss, *Q.C.*, for the defendants.

HAMMILL v. HAMMILL.

Will, construction of—"Effects."

The judgment of Proudfoot, J., 4 C. L. T. 288, was affirmed.

Moss, *Q.C.*, for the appeal.

Maclennan, *Q.C.*, contra.

FERGUSON v. FERGUSON *et al.*

Fraudulent conveyance—Estoppel.

Action impeaching a conveyance of land to M., the wife of K., on the ground that the land was really bought with K.'s money, and was so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K. There was no evidence of fraudulent intent connected with the conveyance to M. It appeared that the plaintiff was himself consulted with regard to the matter, and knowing all the circumstances of K.'s financial position, he expressed his approval of what was done. He was not then a creditor of K., and did not become so till over a year afterwards.

Held, under these circumstances, affirming the decision of Ferguson, J., that the plaintiff could not have the deed set aside as a fraud upon him.

Moss, Q.C., and *Hudspeth*, Q.C., for the plaintiff.

McIntyre, for the defendant.

BROOKES v. CONLEY *et al.*

Verbal agreement—Action to have same expressed in writing—Jurisdiction—Declaratory judgment.

In this action B. set up a verbal agreement entered into between himself and C., they being proprietors of adjoining lands, to the effect that C. should build a house in such a position that the southern wall would encroach nine inches upon B.'s land, and B. was to be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C. This agreement was made in 1873, and shortly afterwards C. erected his building as agreed upon. B. began this action before the expiration of ten years from the date of the verbal agreement, and claimed that he was entitled to have the agreement put in writing, and executed by C., so as to enable him to register it, and asked for judgment declaring him entitled to all the rights and privileges contained in the verbal agreement, or, in the alternative, for possession of the nine inches of his land which was covered by the wall of the building erected by C. C. set up (amongst other defences) that whatever was done on the nine inches, was done by the leave and licence, and at the express instance and desire of B., and further that he never did, nor did he then object to B. being allowed to build against and use the wall in question, as a party wall, and that he had always conceded B.'s right so to do on payment of half the actual cost thereof.

Held, affirming the decision of Ferguson, J., that under these circumstances, the action must be dismissed.

Dickson, Q.C., for the plaintiff.

Dougall, Q.C., for the defendant.

FITZGERALD v. WILSON.

Tax sale—Collector's roll—Evidence of non-payment—Warrant.

In an action impeaching a tax sale, the evidence supplied was by the production and proof of the original non-resident collector's roll for 1877,

in which this land appeared in arrear for $20.60. That was the only roll in which the land appeared for that year. Similar rolls were proved for 1878, with the taxes at $18.60, and for the year 1879, with taxes at $20.60. These sums with interest amounted to $76.92, to realise which the land was sold. Proof was also made of the due preparation of the warrant to sell, and the due advertising in the Official Gazette. It was not disputed that the land was properly dealt with as non-resident land during these years.

Held, that the proof was sufficient, for the rolls produced showed in truth, the very inception of the rates and taxes in question by the entries on the non-resident roll in pursuance of 32 Vict. cap. 36, sec. 92. *Chrysler* v. *McKay*, 5 S. C. R. 436, distinguished.

The warrant recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded: "Now, I, the warden command you to levy, etc."

This was given to the proper officer to sell, viz., the treasurer, was produced by him, and was acted upon by him. The warrant purported to be drawn up pursuant to the authority given by 32 Vict. cap. 36, sec. 128.

Held, that the warrant as drawn up and acted upon justified the sale.

The Court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice results from literal inaccuracy in the frame of the warrant to sell.

Maclennan, *Q.C.*, for the plaintiff.

S. H. Blake, *Q.C.*, and *Walsh*, for the defendants.

CLARK v. HAMILTON PROVIDENT COMPANY.

Fraudulent preference—Insolvent circumstances.

The H. Company and C. were creditors of S. S. gave the H. Company security on his lands for his claim, which appeared to be good and sufficient to secure the amount due. Afterwards S. gave C. a chattel mortgage on his goods to secure C.'s claim. It did not appear that there was any fraudulent intent on S.'s part to prefer C. to the H. Co. in giving the chattel mortgage. The H. Company now alleged that S. was in insolvent circumstances when he gave the chattel mortgage to C., and sought to have it declared void as a fraudulent preference.

Held, that the H. Company was not entitled to the relief asked.

Creasor, for the plaintiffs.

William Bell, for the defendants.

WATERS v. DONALLY.

Contract—Rescission—Undue advantage—Inequality between the contracting parties.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress or recklessness or wildness or want of care, and when the facts show that one party has taken undue advantage of the other by reason of such a condition of things, a transaction resting upon such unconscionable dealing will not be allowed to stand.

Held, therefore, in this case, affirming the decision of Osler, J.A., that it appearing that the plaintiff, being overmatched and overreached by the defendant, without information, and without advice, made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant, the plaintiff was entitled to have the agreement of exchange rescinded. The plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect were such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected.

Miller, for the plaintiff.

McClive, for the defendant.

[23RD DECEMBER, 1884.

ROSS v. MALONE.

Sale of lands by sheriff before return of fi. fa. goods—Irregularity—43 Geo. 3, cap. 1—R. S. O. cap. 66.

Held, affirming the judgment of Ferguson, J., following *Doe dem Spafford* v. *Brown*, 3 O. S. 95, and *Ontario Bank* v. *Kirby*, 16 C. P. 35, decided under 43 Geo. 3, cap. 1, that the issue of an execution against lands before the return of an execution against goods, is an irregularity, and not a void proceeding, and that that is the law under R. S. O. cap. 66, the provisions of the statutes seeming to be as nearly equivalent as language can make them without using the same words.

Lount, *Q.C.*, for the plaintiff.

Pepler, for the defendant Boys.

H. Lennox, for the defendant Giffin.

[19TH DECEMBER, 1884.

LANGTRY v. DUMOULIN.

Rectory endowment—Rectory lands—29 & 30 Vict. cap. 16—Construction—Maintenance.

Certain land was granted by patent from the Crown, dated 26th December, 1817, to D. B., J. B. R. and W. A., as trustees for the sole use and benefit of the parishioners of the Town of York forever, as a churchyard and burying ground for the inhabitants of the said Town of York, and appurtenant to the church then built thereon. This patent was surrendered to the Crown, and another patent dated 4th September, 1820, was issued to the same trustees reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the parishioners, should be held upon, and for the trusts and uses thereinafter stated, which trusts were as follows, "in trust to hold the same for the sole use and benefit of the resident clergyman of the said Town of York, and his successors appointed or to be appointed Rector of the Episcopal Church therein, to which the said land is appurtenant to make leases of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use * * * and when a Rectory was erected and an incum-

bent appointed * * the trustees should convey to such incumbent * * and his successors forever as a corporation sole to and for the same uses and upon the same trusts." Certain other lands were also granted by another patent from the Crown, dated 26 April, 1819, to W. D. P., J. B. and J. S., upon trust to observe such directions, and to consent to and allow such appropriation and dispositions of them, and to convey the same in such manner as should thereafter be directed by order in council. These lands were subsequently conveyed by W. D. P., J. B. and J. S., to the other trustees, D. C., J. B. R. and W. A., by deed dated July 4th, 1825, reciting an order in council, dated 2nd December, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being. This recital was the only evidence of the contents of the order in council. The conveyance by the trustees granted the lands to the trustees named in the order in council, "upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the Town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein to which the said lands are appurtenant," which deed contained proviso for conveyance by the trustees upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th of September, 1820.

The Town of York was subsequently incorporated as the City of Toronto, and by Letters Patent, dated the 16th January, 1836, a parsonage or rectory was erected and constituted in the said City of Toronto designated as the first parsonage or rectory within the Township of York, otherwise known as the parsonage or Rectory of St. James, and 800 acres of land were set apart as a glebe or endowment to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or Rectory of St. James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of 4 July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the three trustees granted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., Rector of St. James, and his successors in the said rectory, forever as a corporation sole to and for the same uses, and upon the same trusts as are mentioned and expressed in the said patent and deed.

The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent, on the 16 February, 1857, and was in possession of the said lands, and in receipt of the rents and profits thereof, until the time of his death which happened on the 20th March, 1882.

In a suit brought by the incumbents of several churches, which were subsequently erected in the said City of Toronto, and the Synod of the Diocese, to have the lands covered by the patent of 1820 and the deed of 1825, divided under the provisions of 29 and 30 Vict. cap. 16 it was

Held, affirming the judgment of Ferguson, J., that the lands in question were covered by the terms of the act. That prior to the year 1866,

there were rectory lands derived directly from the clergy reserves and lands specially granted to trustees which were treated as endowments for rectories, and the Legislature intended to deal with both classes. That the delivery up and cancellation of the patent of 1817, being to correct an error could not be held to be such a consideration as would make the patent of 1820 a grant for value. That Crown grants, which were of a *quasi* public character, were different from private gifts, and the Synod in the case of the former, had petitioned for obtained the power they desired. That 14 & 15 Vict. cap. 175, sec. 2, (C. S. C. cap. 75) affords strong evidence that prior to the year 1866, there had been endowments for rectories out of the public domain as well as out of the clergy reserves.

After the hearing and before the appeal was argued a motion was made to strike the case out of the list, on the ground of maintenance, and it was shown that the defendant, the Rev. J. P. D. did not wish to proceed with this suit, but that as he was pressed to do so by his Vestry and Churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to the costs.

Per Boyd, C. There was maintenance in the suit, but not in the criminal sense. The Vestry and Churchwardens had so intermeddled in the litigation, that their conduct savoured of maintenance. Their claim, if anything, was antagonistic to the defendant, the Rev. J. P. D., and not a common interest. The Court should not allow strangers to come in and promote an appeal where the defendant does not wish it.

Per Proudfoot, J. The Churchwardens could not be held liable to the objection of maintenance. There were various ways in which the success of the defendant, the Rev. J. P. D., would be beneficial to them, and they believed they had an interest in the result of the action.

H. Cameron, Q.C., Maclennan, Q.C., and *Moss, Q.C.*, for the plaintiffs.

Howland and *H. D. Gamble*, for the defendant, Dumoulin.

A. Hoskin, Q.C., for the Township Rectors.

E. Douglas Armour, for the defendants, Darling and H. G. Baldwin.

[Boyd, C., 17th December, 1884.

In re KERR; KERR v. KERR.

Will—Testator's estate to be valued by executors—Certain of the beneficiaries consulted as to valuers to exclusion of others.

A testator provided in his will that on the death of his widow his executors, who were two of his children, should have his farm valued, and gave permission to his son E. to take the farm at that valuation, after which the proceeds were to be divided amongst all the other children.

On the death of the widow the executors did proceed to value the farm, but they asked E., who had made up his mind to keep the farm, to aid them in nominating three valuers, while none of the other children were notified of what was going on, or asked to be present at the naming of the valuers. There was no evidence that the valuers had reached their conclusion, other than in a legitimate and upright way. Certain of the children now impeached the valuation and asked for administration.

Held, that there should be another valuation of the farm, and if the parties desired it, it might be referred to the Master for that purpose, or

the executors might, on notice to all interested, proceed to do what was needful in that behalf. The three valuers who were called in were required to exercise in some sense judicial functions, and it would be contrary to first principles to let the one who was to purchase suggest or appoint his own nominees to fix the value without notice to those interested in getting the best price.

W. Cassels, Q.C., for the plaintiff.

GRAHAM v. WILLIAMS.

Mechanic's lien—R. S. O. cap 120—Right of lien holder against tenant to charge the fee.

G. supplied bricks to W., who had leased certain land from H. with the right to purchase on certain terms. The contract for the supply of the bricks was made between G. and W., and on W.'s credit; although H. was aware that they were being supplied, and that a building was being erected on his property, and he had agreed to supply two-thirds of the money required for the building by way of loan to W. on security of the property. W. did not exercise his right of purchase, and G. filed his lien against both W. and H., and brought an action to charge the interest of H. with the lien.

Held, that the Mechanics' Lien Act, R. S. O. cap. 120, intended something more than the landlord's quiescence or acquiescence while the building is being erected in order to subject his land to the payment of his tenant's debts, and that in such a case the fee may be charged, but only when consent thereto is given in writing by the owner in fee. Under the circumstances it could not be said the bricks were furnished on behalf of H. without a consent in writing, as provided by sec. 6, sub-sec. 2; his mere knowledge of what was being done would not make his estate liable if it turned out that the tenant W. was not able to complete his purchase.

O'Gara, Q.C., for the plaintiff.

Gormully, for the defendant Henry.

[PROUDFOOT, J., 27TH OCTOBER, 1884.

In re STANDARD FIRE INSURANCE CO.

Winding up proceedings—Contributories.

Appeal from Master's Report, which placed certain stockholders on the list of contributories to the extent of their unpaid stock.

CHISHOLM'S CASE.

C. having been communicated with by the president of the company, agreed to act as a director, and gave his note for $500 in order to obtain a qualification. The president subscribed for 50 shares of stock for him, upon which the $500 note would pay 10 per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on fifty shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company, and he had paid nothing. The president then absconded,

and he was notified of a five per cent. call, and he gave a note for $250 in payment of same, not (as he alleged) because he was liable but because he was told that would settle his total liability, and he did not wish to enter into a suit.

Held, that he was properly placed on the list of contributories.

TURNER'S CASE.

T. signed a power of attorney to C. to subscribe for twenty shares of stock, and delivered it to him, on the understanding that it was not to be used except he became a director of the company. C. directed the accountant to write T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued and an advertisement published in a newspaper, and a return made to the Government, with T.'s name inserted as a director in the two former, and as a member in the latter, but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement, or returns, and that he did not know his name was in any of them, and on receipt of a notice of a five per cent. call he at once repudiated all liability.

Held, that as T. had made it a distinct stipulation that unless he was made a director that the power of attorney was not be used, he made such stipulation a condition precedent to his becoming liable as a shareholder, and that the circumstances brought the case within the line of cases of which *In re National Equitable Provident Society*, *Woods case*, L. R. 15 Eq. 236, is an example, and that T.'s name must be removed from the list of contributories.

FINDLAY'S CASE.

Held, that F. was not properly a contributory on the same grounds and principle as in Turner's case.

BARBER'S CASE.

B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that the ten per cent. was to be payable in one year from date. He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to show that he made his becoming a shareholder a condition precedent to his becoming a director.

Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C. to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act.

Held, also, following *National Insurance Co.* v. *Eagleson*, 29 Gr. 406, that it was not material that the name was not entered in the subscription book, or that there was no specific allotment of stock, and that B. was properly placed on the list of contributories.

CASTON'S CASE.

C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years, and he was appointed solicitor under the seal of the company,

received notices of meetings and calls, and did not expressly repudiate his liability.

Held, that C., who was a professional gentleman, and should have known that it was necessary to have his shares cancelled, was properly placed upon the list of contributories.

Lash, Q.C., and *A. C. Galt*, for the appellants.

Bain, Q.C., for the liquidators.

Laidlaw, for the Company.

[2ND JANUARY, 1885.

THOMAS v. INGLIS.

Fixtures—Property in chattels under written agreement — Intention when affixed to freehold—Injunction.

T. being liquidator of a company which was being wound up, sold the manufactory to H. for $9,000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there were an engine, boiler, pulleys, etc., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler, and pulleys, but T. objected to his so doing until assured that they would be replaced by better machinery. H. purchased from J. & H. the defendants another engine, boiler, shafting, hangers, and pulleys to replace the old ones, upon certain conditions set out in in agreements in writing, one of which was as follows: "And it is hereby agreed between the parties that the property in machinery is not to pass to the said H., but is to remain in the said J. & H., until the full payment of the price is paid, * * but the said H. to have possession at once, and to use the same until any default made in the payment of the price, * * when the said J. & H. resume possession." The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises other than the one from which the old ones had been removed, but they could be removed by taking down a part of the wall of the building in which they were placed, and without injury to the old building; and the hangers and pulleys were bolted to joists, but could be removed without injury to the building if done carefully. H. failed in business, assigned his estate for the benefit of his creditors, and made default in payment, and J. & H. began to remove the machinery.

In an action brought by T. for an injunction restraining the defendants J. & H. from such removal,

Held, that under the circumstances and in a case of this kind the intention when the chattels were affixed to the freehold must govern, and that the plain agreement evidenced by writing between H. and the defendants, was that the property in the machinery should not pass from the defendants to H. until they were paid for, and that the plaintiff must fail.

Tilt, Q.C., and *Mulock*, for the plaintiffs.

McCarthy, Q.C., for the defendants.

[28TH JANUARY, 1885.

POWELL v. CALDER.

Chattel mortgage—Security—Preference—Judgment creditor—Interpleader—Bona fides—Void transaction—Infancy.

S. & W., a firm, of whom W. was a minor, becoming embarrassed, arranged with H., the manager of J. G. & Co., their principal creditors, to give security for their debt. At the instigation of H. two notes for the amount of their indebtedness, maturing at short dates, were made by S. & W., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G. and connected with him in business, and a chattel mortgage was given by S. & W. on anything they had in their business to P. to secure him, and $50 was paid him by J. G. & Co. for endorsing the notes.

A few days after the mortgage was given, C. caused the sheriff to seize S. & W.'s goods under an execution in his hands delivered subsequent to the making of the mortgage. In an interpleader action between P. claiming under the chattel mortgage and C. claiming under his execution, it was

Held, that no distinction could be made between P. and G. & Co. in the transaction, and if the mortgage was invalid it must be for want of *bona fides;* that the transaction only assumed the shape it did in order to avoid the statute against fraudulent preferences; that pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors; that the notes matured at such short dates, no time was given to the debtor, no new advance was made, and no security given that the notes or the mortgage would not be enforced when they fell due, and that upon the whole case the mortgage was "null and void against the creditors."

Semble, the infant's share did not pass by the chattel mortgage nor by an assignment for the benefit of creditors which was afterwards made, but that as C., the plaintiff, seized under an execution it must be assumed that his judgment was properly recovered.

Meredith, Q.C., and *Gibbons*, for the plaintiff.

Lash, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 19TH NOVEMBER, 1884.

In re JOSEPH HALL MFG. COY.

Winding up order—45 Vict. cap. 23 (D)—Jurisdiction of Master in Chambers to refer.

On the application of Peter Ryan, a creditor of the Joseph Hall Mfg. Co., the Master in Chambers on the 4th November made an order for winding up the company under 45 Vict. cap. 23 (D). Ryan's application was made by a solicitor who had formerly acted as solicitor for the company. Three other creditors of the same company now applied to the Court for an order similar to that obtained by Ryan, and to set aside Ryan's order on several grounds, or in the alternative for an order giving them the carriage of the proceedings in the Master's office under Ryan's order.

Held, that it is preferable to have the winding up conducted by solicitors who are totally disconnected with the company to be wound up.

Held, also, that it is not competent for the Master in Chambers to make an order under sec. 77 of the Act, as amended by 47 Vict. cap. 39, sec. 5, referring the winding up to the Master in Ordinary. That may be done by a Judge in conformity with the usual course of proceedings in other causes and matters, but it is not the practice (save in one or two exceptional cases), to have references ordered by the Master in Chambers to the Master in Ordinary. The intention of the Act is that the Master in Chambers, or Local Master, or Master in Ordinary, may grant a winding up order, and conduct all the necessary proceedings in his own office and before himself as a judicial officer.

The carriage of the proceedings was accordingly given to the applicants.

William Roaf, for the applicants.

Moss, *Q.C.*, for Ryan.

[15TH DECEMBER, 1884.

KELLY v. IMPERIAL LOAN CO.

Costs—Payment, pending appeal.

The defendants, being entitled by the judgment of the Court of Appeal to the costs of the action, took out of Court for suit the bond given by the plaintiff for security for the costs of the action. Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond, under an order giving him leave to do so, paid into Court to the credit of this action $400, the penalty of the bond, to abide further order.

Upon the application of the defendants the Chancellor directed the $400 to be paid out to their solicitors upon the solicitors undertaking to refund the amount if the Supreme Court should vary the disposition of costs made by the Court of Appeal.

Moss, *Q.C.*, and *A. C. Galt*, for the defendants.

Wallace Nesbitt, for the plaintiff and the surety.

In re THIN.

Trustee for infants—Insurance moneys—Security—47 Vict. cap. 20 (O).

An order having been made under 47 Vict. cap. 20, sec. 12 (O), for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee, and required him to give security in double the amount to be received.

Held, on appeal from his direction to give security, that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.

J. C. Hamilton, for the appeal.

[15TH JANUARY, 1885.

CAMERON v. CAMERON.

Production of documents—Letters written but not mailed.

In an action to establish a will which the defendants impeached for want of testamentary capacity, and to set up a prior will, one of the defendants included in his affidavit on production "Letters or copies of letters from himself to the testatrix, dated 29th December, 1882, and 8th March, 1883," but objected to produce them for inspection, on the ground that they had never been mailed or sent to their destination. The Master in Chambers ordered the letters to be produced, and the defendant appealed.

Held, that all memoranda or writings which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production unless they can be protected, and the mere fact that a letter was not forwarded to its destination is no ground of exemption.

A. H. Marsh, for the plaintiff.

Huson W. M. Murray, for the defendant.

[CAMERON, C.J., 6TH JANUARY, 1885.

BROWN v. NELSON.

Interpleader—Separate action to try right of property—Trial of issue—Postponement.

The execution creditor attacked, by an action in the Chancery Division, the assignment of shares made by the judgment debtor in anticipation of a seizure by the sheriff (see 4 C. L. T. 594), and the claimant and judgment debtor were both parties thereto. Under these circumstances the trial of the interpleader issue between the claimant and the execution creditor was postponed till after the trial of the action.

Aylesworth, for the sheriff.

C. R. W. Biggar, for the execution creditor.

Wallace Nesbitt, for the claimant.

[OSLER, J.A., NOVEMBER, 1884.

GORING v. CAMERON.

Action for recovery of land—Landlord and tenant—Appearance—Counterclaim for assault.

In an action for the recovery of land, M. T. G., the landlord of the defendant, D. C., intervened and appeared to the writ. The defendant, D. C., did not appear until statement of claim delivered, when he appeared and joined with M. T. G. in her statement of defence.

Held, that the appearance of D. C. was regular.

The defendant, D. C., counterclaimed for damages in respect of a trespass by the plaintiff upon the lands in question whilst he was in possession, and for an assault, etc., whereby he was compelled to quit the premises.

Held, that the counterclaim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116.

Held, also, that the counterclaim should not be disallowed or excluded under Rules 127 (B) or 168 on the ground of inconvenience, it not appearing that there would be any inconvenience, and

Semble, that the counterclaim was sufficiently connected with the cause of action to make it advisable that they should be tried together.

[6TH JANUARY, 1885.

BROWN v. NELSON.

Set-off—Costs—Solicitor's lien.

The judgment of the Master in Chambers, 4 C. L. T. 594, was affirmed.

Wallace Nesbitt, for the appeal.

C. R. W. Biggar, contra.

[ROSE, J., 2ND DECEMBER, 1884.

LIVINGSTONE v. TROUT.

Demurrer—Allowance—Costs—Rule 195 (a).

The plaintiff having demurred to a paragraph of the defence, the defendant did not within ten days after delivery enter the demurrer for argument, and give notice, nor did he serve an order for leave to amend, and the plaintiff was therefore, by Rule 195 (*a*), entitled to the same benefit as if the demurrer had been allowed on argument. The plaintiff moved *ex parte* for judgment upon the demurrer.

Rose, J., after consultation with Osler, J.A., held that the practice in such a case is to apply to a Judge in Court upon notice to the opposite party for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs, but on the return of the motion the party in default would have no right to be heard as to the validity of the pleading.

W. H. P. Clement, for the plaintiff.

[27TH DECEMBER, 1884.

MACDONALD v. NORWICH UNION FIRE INS. SOCIETY.

Production—Privileged documents.

To an action brought by the plaintiff, as assignee of one McLean of a policy of insurance covering the goods in McLean's store, the defences set up were amongst others (i) That McLean's books had been falsified; (ii) That the fire had occurred through the wilful negligence of McLean. The defendants employed two experts to investigate McLean's books, and his conduct with respect to the fire, and these experts made reports. The defendants' affidavit on production set out as documents which they objected to produce, "report of adjuster for Norwich Union Fire Insurance Society for Counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report and for information of Counsel." It was further stated in the affidavit that these documents were "privileged being part of the defendants' case, and prepared for the instruction of Counsel, and prepared specially for this litigation and in contemplation thereof."

Held, on appeal from the Master in Chambers reversing his decision, that these documents were privileged from production.

Osler, Q.C., for the appeal.

Shepley, contra.

[29TH DECEMBER, 1884.

MINKLER v. McMILLAN.

Discovery—Partner—Rule 224.

An action against the endorser of a promissory note brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. & M. B. & M. dissolved partnership, and the action was brought after the dissolution in the name of M. only.

On the application of the defendant the Master in Chambers made an order under Rule 224 for the examination of, and the production of documents by, B. as a person for whose immediate benefit the action was being prosecuted.

Rose, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the Master; varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery.

C. Millar, for the appeal.

W. H. P. Clement, contra.

[31ST DECEMBER, 1884.

WEST MIDDLESEX ELECTION CASE.

Ontario Controverted Elections Act—Costs, taxation of—Interviewing witnesses before trial.

The petition was dismissed, and the petitioner ordered to pay the respondent's costs. R. S. O. cap. 11, sec. 100, provides that the costs may be taxed according to the same principle as costs are taxed between solicitor and client in the Court of Chancery.

Held, on appeal from the taxing officer, reversing his ruling, that the respondent was not entitled to tax against the petitioner the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and persons bribed.

H. J. Scott, Q.C., for the appeal.

William Johnson, contra.

[12TH JANUARY, 1885.

POWELL v. LONDON ASSURANCE COMPANY.
POWELL v. QUEBEC INSURANCE COMPANY.

Jury notice—Application for leave to file—Notice of motion—Costs.

The plaintiff having omitted to file a jury notice with his last pleading, applied *ex parte* to the Master in Chambers for leave to withdraw the last pleading and refile it with a jury notice.

Held, on appeal from the order of the Master granting the leave, that notice of the motion should have been given to the defendant.

Held, also, that plaintiff, on asking for the relief, should have been called upon to show that the case was one proper to be tried by a jury, and, in default, that leave should not have been granted.

On such a motion costs should be refused to a party who appears merely to ask for costs.

The appeal was treated as a substantive motion for leave to file the jury notice, and the order of the Master was affirmed without costs.

W. A. Foster, for the plaintiff.

Charles Millar, for the defendant.

[12TH JANUARY, 1885.

REGINA v. SCOTT (Two Cases).

Conviction—Appeal to sessions—Certiorari—32 & 33 Vict. cap. 31, sec. 71, and 33 Vict. cap. 27, sec. 2.

The defendants having been convicted by the police magistrate of Chatham of an offence against the provisions of C. S. C. cap. 95, appealed to the Sessions, and the convictions were affirmed on appeal.

The defendants now applied for a *certiorari*, and contended that the right to *certiorari* was not taken away, notwithstanding 32-33 Vict. cap. 31, sec. 71, as amended by 33 Vict. cap. 27, sec. 2, because the evidence did not disclose any offence; for the decision in *Regina* v. *Dodds* showed that the evidence taken in these cases proved no such offence as was set out in the convictions; and hence the magistrate had no jurisdiction.

Held, that where the magistrate has jurisdiction over the offence charged, and the right to *certiorari* is taken away, the Court cannot examine the evidence to see if the magistrate had jurisdiction to convict.

Langton, for the defendants.

Cartwright, for the Crown.

[3RD JANUARY, 1885.

NAPANEE, TAMWORTH & QUEBEC RY. CO. v. McDONELL.

Dismissing action—Want of prosecution.

Held, on appeal from the Master in Chambers, that the filing of a statement of claim is not a sufficient answer to a motion to dismiss the action for want of prosecution.

The plaintiffs not having in the opinion of the learned Judge sufficiently explained a delay of nearly two years, and not having shewn a probability of speeding the cause, the action was dismissed with costs.

McPhillips, for the appeal.

Lefroy, contra.

[30TH JANUARY, 1885.

PLUMMER v. LAKE SUPERIOR NATIVE COPPER COMPANY.

Judgment under Rule 80—Foreign corporation in liquidation.

Leave was given to sign final judgment, under Rule 80, against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario.

Shepley, for the plaintiff.

Rae, for the defendants.

[THE MASTER IN CHAMBERS, 19TH JANUARY, 1885.

McCULLOUGH v. SYKES.

Judgment—Revivor—Statute of Limitations.

Judgment was recovered in 1856, and on 23rd October, 1869, an order of revivor was made to revive the cause in the name of the plaintiff as executrix of the judgment creditor. A suggestion was accordingly entered upon the Roll on 23rd January, 1870. On 6th December, 1884, the Master in Chambers made an order, on the *ex parte* application of the plaintiff, to issue execution under Rule 356.

Geo. F. Harman, for the defendant, now moved to set aside the order on the ground that the judgment had been barred by the Statute of Limitations.

Geo. Bell and *C. E. Jones*, for the plaintiff, contra.

THE MASTER IN CHAMBERS held that the proceedings by revivor had the same effect as proceedings by *scire facias* would have had before the C. L. P. Act; and therefore that it did not merely give a right to execution but conferred on the plaintiff a new right in respect of the judgment; and that the statute commenced to run from the entry of the suggestion. He also held, following *Allan* v. *McTavish*, 2 App. R. 278, and *Boice* v. *O'Loane*, 3 App. R. 167, that the judgment debt being a specialty within R. S. O. cap. 61, would not be barred until the lapse of twenty years.

MASTER'S OFFICE.

[THE MASTER IN ORDINARY.

In re REES.

URQUHART v. TORONTO GENERAL TRUSTS COMPANY.

Master's office—Security for costs—Creditors.

Held, that parties residing out of the jurisdiction who come into the Master's office in an administration action and claim to be creditors of an estate administered there will be required to give security for costs.

S. M. Jarvis, for the plaintiff.

H. D. Gamble, for the claimant.

CLARK v. UNION FIRE INSURANCE COMPANY.

Production—Foreign commission—Sending papers produced for use on commission.

Held, that books and documents produced in an action may, where a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission.

But documents produced in another action which is *sub judice* will not be taken from the office for such a purpose.

R. S. Cassels, for the applicant.

W. A. Foster, for the plaintiff.

THE

CANADIAN LAW TIMES.

VOL. V. MARCH, 1885. No. 3.

OF THE PURCHASER'S RIGHT TO A GOOD TITLE AND HOW IT MAY BE WAIVED.

A PARTY offering an estate for sale, without qualification, asserts in fact that it is his to sell, and, consequently, that he has a good title (*a*), and undertakes, in the absence of express stipulation, to make over to the purchaser the complete and absolute dominion of the soil, saving, of course, the ultimate rights of the Crown. And, inasmuch as land is not the subject of actual manual delivery, as are personal chattels, the vendor is bound to produce such evidence of ownership as will satisfy the purchaser that he has the right to transfer to him all the legal and equitable interests in the land. In *Hiern* v. *Mill* (*b*), Lord Eldon said that "land is held not by possession, but by title; not so as to personal chattels; for the common traffic of the world could not go on. Therefore a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel, has been adopted in the Bankrupt Acts: so that, if the owner has permitted the bankrupt to be the visible proprietor the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the

(*a*) *Freme* v. *Wright*, 4 Madd. 365.
(*b*) 13 Ves. 122.

ground. It is not even *prima facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and if, being asked for his deeds, he acknowledges he has not got them, the purchaser is bound to further inquiry."

The purchaser's right to a good title does not arise out of the agreement itself, though it may be restricted thereby, but is a right given by law (*c*). And it is his right to insist that the question whether the vendor has, or has not, a good title, shall be sifted to the bottom before he can be called upon to accept an indemnity, or compensation for a defect, or to let the vendor off his contract (*d*). But where a purchaser had, since the purchase, by his own act, acquired the means of curing a defect in the title, the Court refused to dismiss the vendor's bill (*e*). The purchaser may, however, waive his right to a good title by a term of the agreement, or by matters contemporaneous with it or happening after it. But any condition limiting the liability of the vendor in this respect, being in derogation of the purchaser's right, will be strictly construed. "If a vendor means to exclude a purchaser from that which is a matter of common right, he is bound to express himself in terms the most clear, and unambiguous, and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor" (*f*).

The right to demand a clear title is sometimes limited by a condition that the purchaser shall take such title as the vendor has (*g*), or some particular title described in the condition; or in some other way the purchaser's right to enquiry is limited (*h*); and such stipulations are valid and

(*c*) *Ogilvie* v. *Foljambe*, 3 Mer. 53.

(*d*) *Knatchbull* v. *Grueber*, 3 Mer. 137.

(*e*) *Hume* v. *Pocock*, L. R. 1 Eq. 662.

(*f*) Per Sir J. L. Knight Bruce, V.C., in *Symons* v. *James*, 1 Y. & C. C. C. 490.

(*g*) *Hume* v. *Pocock*, L. R. 1 Eq. 423; 1 Ch. 379.

(*h*) *Monro* v. *Taylor*, 8 Ha. 51, 71; *Corrall* v. *Cattell*, 4 M. & W. 734; *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658.

will, in general, bind the purchaser (*i*). But they are construed strictly in his favour, and he must be clearly shown to have deprived himself by contract of his right; otherwise, such conditions will be impotent. The cases in which his right is abridged have been divided into two classes:—"First, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and secondly, cases in which they preclude him, not only from making enquiries from the vendor as to his title, but from making any investigation anywhere about the title" (*j*).

In cases falling within the first class, though the purchaser cannot make requisitions upon the vendor, he is at liberty to show *aliunde* that the vendor cannot make a good title. Hence, in *Jones* v. *Clifford* (*k*), where the condition was that the purchaser "should not require the production of, or investigate, or make any objection in respect of the prior title"—a point of commencement having been fixed by the contract—the purchaser was not precluded from showing that the vendor had no title to the fee, which was in fact in the purchaser subject to a lease to the vendor (*l*). So, where the parties agreed that the vendor (a lessee) should "not be obliged to produce the lessor's title," it was held that, though the vendor was relieved from showing the title of his lessor, the purchaser was not prevented from taking objections which he had discovered himself (*m*). And where the vendor represented the property to be sold as "freehold," it was held that the purchaser was not bound to take an incumbered freehold title, notwithstanding a condition that he should not investigate or take any objection to the title (*n*).

But in cases falling within the second class the purchaser is absolutely precluded from enquiry. So, where an agree-

(i) *Freme* v. *Wright*, 4 Madd. 365.
(j) *Jones* v. *Clifford*, L. R. 3 Ch. D. 790.
(k) Supra.
(l) See also *Darlington* v. *Hamilton*, Kay 550.
(m) *Shepherd* v. *Keatly*, 1 Cr. M. & R. 117.
(n) *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

ment by a lessee to sell two leases "as he holds the same" bound the purchaser to accept a proper assignment without requiring the lessor's title, it was held that he was not at liberty to object to the lessor's title (*o*). And where the purchaser of a term agreed that "the lessors' title will not be shown, and shall not be enquired into," it was held that enquiry was precluded for every purpose, and he was debarred from showing by Acts of Parliament that the lessors had no power to grant leases (*p*). So, by an agreement that the purchaser is to take such title as the vendor has received (*q*), or to take his title without dispute (*r*), the purchaser is precluded from raising any objection to the title.

The implied right to a clear title may be rebutted by other circumstances. "Where the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title" (*s*).

It is frequently made a condition of the agreement, that if the purchaser shall insist on any objection to the title

(*o*) *Spratt* v. *Jeffery*, 10 B. & C. 249. This case seems to conflict with *Shepherd* v. *Keatly*, supra, which is said by Sir Edward Fry (Fry, Sp. Perf. 561) to overrule it; but in *Duke* v. *Barnett*, 2 Coll. 337, the cases are said to be reconcileable.

(*p*) *Hume* v. *Bentley*, 5 DeG. & Sm. 520.

(*q*) *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

(*r*) *Duke* v. *Barnett*, 2 Coll. 337.

(*s*) *In re Gloag & Miller's Contract*, L. R. 23 Chy. Div. 327.

or conveyance which the vendor shall be unable or unwilling to remove, he shall be at liberty to rescind the contract and return the deposit without interest, costs, or further compensation. Various forms of the condition, differing but little in effect, will be found in the reports of the cases cited below.

This stipulation, though not unreasonable, illegal, or improper (*t*), is for the sole benefit of the vendor, and is introduced for the purpose of protecting him against difficulties as to title (*u*), and is therefore construed strictly in favour of the purchaser (*v*).

The vendor cannot take advantage of it if he has knowingly entered into the contract with a defective title; and in such a case the purchaser was held entitled to specific performance with compensation (*w*). So, where a termor agreed to sell the fee, and attempted to take advantage of such a condition on discovery of the want of title by the purchaser, it was held he could not do so, and the purchaser was held entitled to damages (*x*). For equity will compel a vendor to perform as much of his agreement as he is able (*y*).

Notwithstanding this condition, the vendor must perform all the duties of a vendor, with this sole exception that they must be reasonable. He cannot compel the purchaser to take an imperfect abstract if he can make a complete one (*z*). And he must do all that he can to make out his title (*a*).

If the vendor is guilty of any wilful misrepresentation (*b*),

(*t*) *Williams* v. *Edwards*, 2 Sim. 83; *Hudson* v. *Temple*, 29 Beav. 543.

(*u*) *Engel* v. *Fitch*, L. R. 3 Q. B. 314.

(*v*) *Morley* v. *Cook*, 2 Ha. 115; *Hudson* v. *Temple*, 29 Beav. 543; *Greaves* v. *Wilson*, 25 Beav. 290.

(*w*) *Nelthorpe* v. *Holgate*, 1 Coll. 203. But this case was decided upon its own particular circumstances. See p.

(*x*) *Bowman* v. *Hyland*, L. R. 8 Ch. D. 588.

(*y*) *Thomas* v. *Dering*, 1 Ke. 729, and see *Wood* v. *Griffith*, 1 Swans. 54; *Mortlock* v. *Buller*, 10 Ves. 315; *Western* v. *Russell*, 3 V. & B. 192.

(*z*) *Greaves* v. *Wilson*, 25 Beav. 293.

(*a*) *Hudson* v. *Temple*, 29 Beav. 543, and see *Morley* v. *Cook*, 2 Ha. 114; *Hobson* v. *Bell*, 2 Beav. 17.

(*b*) *Price* v. *Macaulay*, 2 D. M. & G. 347.

or makes any attempt to defraud or deceive the purchaser (*c*), the condition will not protect him; and, generally, any gross negligence or improper conduct is apparently sufficient to deprive the vendor of his right to shelter himself under it (*d*). Nor can he avail himself of the condition to improperly escape from the performance of any duty which, by the nature of the contract, he is bound to perform (*e*). And so, where the condition applied to title or conveyance, and the title was satisfactory, but the purchaser refused to complete until the vendor, a mortgagee, had ousted the mortgagor, which he refused to do, it was held that he could not escape from his contract by giving notice to rescind it under such a condition (*f*). And where there was an outstanding incumbrance which the vendor refused to pay off, he was not allowed to rescind (*g*). Nor can he make it the means of escaping from a bad sale (*h*).

The vendor, it has been said, must, on receiving objections to the title, determine which of two courses he will adopt, namely, whether he will answer the objections, or put an end to the contract altogether; and after having elected to answer the objections he cannot at any time afterwards rescind the contract (*i*). But the better opinion is that he cannot annul the contract without attempting to answer the objections (*j*). His duty is very concisely and clearly set out by Cairns, L.J., as follows:—"First, there must be an objection to the title; secondly, there must be inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and fourthly, there must be an insisting by the purchaser on his objection notwithstanding this com-

(*c*) *Greaves* v. *Wilson*, 25 Beav. 296.
(*d*) *Turpin* v. *Chambers*, 29 Beav. 104.
(*e*) *Page* v. *Adam*, 4 Beav. 286.
(*f*) *Engel* v. *Fitch*, L. R. 3 Q. B. 314.
(*g*) *Re Jackson & Oakshott*, L. R. 14 Ch. D. 851.
(*h*) *Greaves* v. *Wilson*, 25 Beav. 296.
(*i*) *Tanner* v. *Smith*, 10 Sim. 411.
(*j*) *Duddell* v. *Simpson*, L. R. 2 Ch. App. 107, and see *Roberts* v. *Wyatt*, 2 Taunt. 277.

munication" (*k*). But even if the purchaser insists upon his objection there must be a certain amount of reasonableness in the vendor's refusal to answer it (*l*). The vendor must give the purchaser the opportunity of waiving the objections (*m*), for if he waives them the vendor cannot then rescind (*n*); and so, where a purchaser filed a bill for specific performance upon receiving, in answer to his objections, a notice of rescission, the Court adjourned the cause in order that the vendor might answer them. The purchaser accepted the title upon receiving the answers, whereupon the Court decreed specific performance with costs (*o*). The notice to the purchaser need not give him a time within which to waive his objections (*p*).

It has been held that a vendor having once been entitled to the benefit of the condition, may waive his right to avail himself of it by replying to the purchaser's objections (*q*), and it is clear that he may waive the right (*r*); and so it is prudent for the vendor in answering the objections to reserve to himself the benefit of the condition by apt words (*s*). To avert the danger of a waiver of this right the vendor usually adds to his condition the words "notwithstanding any intermediate negotiations," or words having the like effect (*t*).

The vendor is protected under this condition from frivolous or untenable objections, or any attempt on the part of the purchaser to compel him to do more than is required of him as his duty under the contract (*u*); and so where

(*k*) *Duddell* v. *Simpson*, L. R. 2 Ch. App. 109.

(*l*) *Greaves* v. *Wilson*, 25 Beav. 295; *Duddell* v. *Simpson*, L. R. 2 Ch. App. 107.

(*m*) *Duddell* v. *Simpson*, L. R. 1 Eq. 578; 2 Ch. App. 102.

(*n*) *Greaves* v. *Wilson*, 25 Beav. 290.

(*o*) *Turpin* v. *Chambers*, 29 Beav. 104; and see *Greaves* v. *Wilson*, supra. But see *Williams* v. *Edwards*, 2 Sim. 78.

(*p*) *Duddell* v. *Simpson*, L. R. 2 Ch. App. 102.

(*q*) *Tanner* v. *Smith*, 10 Sim. 410.

(*r*) *Bowman* v. *Hyland*, L. R. 8 Ch. D. 588; *Morley* v. *Cook*, 2 Ha. 115.

(*s*) *Morley* v. *Cook*, 2 Ha. 115.

(*t*) Dart V. & P. 161.

(*u*) *Page* v. *Adam*, 4 Beav. 269; and see *Lord* v. *Stephens*, 1 Y. & C. Ex. 222.

the purchaser refused to complete when the vendor had done all that he could do, it was held that the vendor might rescind (not having waived his right), though nothing remained to be done but to make payment of the money (*v*). But the condition in that case was, that if, from any cause whatever, the contract was not completed by a certain day, the vendor should be at liberty to annul.

The purchaser having, under the contract, a right to have the title strictly investigated, may waive his right by acts subsequent to the contract, either expressly, or by implication; and the waiver may extend to the whole title or to part only: and in case of an express waiver it may be either absolute or conditional (*w*).

The question of waiver is one of fact (*x*), and the inclination of the Court being in favour of the purchaser the vendor must establish to the satisfaction of the Court that the purchaser intended to waive, and has waived, his right to object to the title (*y*). If there has been fraud or surprise on the part of the vendor, or concealment of a material fact (*z*), or if the information supplied to the purchaser has been deficient, as by means of an imperfect abstract (*a*), the purchaser will not be allowed to suffer (*b*). Where the purchaser's acts are such as to amount to an acceptance of the title as disclosed by the abstract, he is not thereby precluded from showing *aliunde* that the vendor cannot make a title (*c*). But, even before delivery of an abstract, if the purchaser chooses to assume the title to be good, or if he act upon his own knowledge or opinion without seeing, or without asking to see, how the title is made out by the vendor, he may be concluded by his acts, especially in

(*v*) *Hudson* v. *Temple*, 29 Beav. 543.

(*w*) Fry, Sp. Perf. § 1302.

(*x*) *Burroughs* v. *Oakley*, 3 Swanst. 168.

(*y*) *Blacklow* v. *Laws*, 2 Ha. 47; *Commercial Bank* v. *McConnell*, 7 Gr. 327, 328; *O'Keefe* v. *Taylor*, 2 Gr. 307.

(*z*) *Bousfield* v. *Hodges*, 33 Beav. 90.

(*a*) *Blacklow* v. *Laws*, 2 Ha. 40.

(*b*) *Jenkins* v. *Hiles*, 6 Ves. 655.

(*c*) *Warren* v. *Richardson*, You. 1; *Bown* v. *Stinson*, 24 Beav. 631; *Denison* v. *Fuller*, 10 Gr. 498.

Ontario, where titles are comparatively simple, and the formalities of conveyancing practice are not so strictly observed as they are in England (*d*). Taking possession and making expensive alterations in a mill and its machinery were held to be an acceptance of the title (*e*). The principle is very tersely put by Spragge, V.C., as follows:—"Could [the purchaser] reasonably say, if the title turns out not good, I intend to return the property into the hands of the vendors in the state to which I have altered it? If he could not reasonably say this, the alternative seems to me to be, that he must be taken to have intended not to investigate the title" (*f*). In this case there was also some evidence of the purchaser's prior knowledge of the title. So, acceptance of a title may be implied from writing a letter apologizing for nonpayment of the purchase money (*g*), for until the title is approved the purchaser is not, in general, bound to pay the purchase money. Taking possession, paying part of the purchase money, giving security for the balance, and mortgaging her interest in the land, were held to bind the purchaser as an acceptance of title (*h*). But payments are no waiver where the contract contemplates immediate possession, and provides for payment by instalments (*i*). Giving a mortgage for purchase money, and taking a release of dower from the mother of infant heirs were accepted as evidence of approval of the title of the heirs (*j*). So, building on the land, asking twice for a conveyance, and offering a note for the purchase money are acts of waiver (*k*). Delay in making requisitions on title after delivery of the abstract (the purchaser being in possession), and only requiring production of the deeds after notice by the vendor to complete the purchase con-

(*d*) *Commercial Bank* v. *McConnell*, 7 Gr. 331.

(*e*) *Commercial Bank* v. *McConnell*, 7 Gr. 323.

(*f*) P. 331; and see *Cutter* v. *Simons*, 2 Mer. 103. But the acts must be very strong; see *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116.

(*g*) *Margravine of Anspach* v. *Noel*, 1 Mad. 310; *McDonald* v. *Garrett*, 8 Gr. 290.

(*h*) *Haydon* v. *Bell*, 1 Beav. 337.

(*i*) *Darby* v. *Greenlees*, 11 Gr. 353.

(*j*) *McDonald* v. *Garrett*, 8 Gr. 290.

(*k*) *Denison* v. *Fuller*, 10 Gr. 498.

cluded the purchase as to the title abstracted (*l*); and even silence may be similarly construed (*m*). But where property was purchased by persons who dissolved partnership before acceptance of title and made a division of the land between them, it was held that this did not relieve the vendor from his obligation to make a good title (*n*).

Attempting a re-sale of the property is an important element for consideration in determining upon implied acceptance of title (*o*). An actual or attempted disposal of a portion of the property does not preclude the purchaser from showing that that portion is essential to the enjoyment of the whole and insisting upon title being made thereto, especially if the treaty for a title has continued (*p*); but a sale of a portion of the property in small lots, and cutting timber thereon, if an acceptance of title, cannot be relied upon as such if the vendor subsequently, on demand therefor, delivers an abstract; and he will be bound to verify the abstract (*q*). If the vendor in such a case intends to rely on the purchaser's acts of waiver he should take advantage of them at once. By delivering an abstract thereafter, and answering requisitions, he admits that the question of title is still open (*r*).

It has been said that taking possession is a waiver of objections to title; that the purchaser proceeds upon the supposition that the contract will be executed; and that he therefore agrees that from the day of taking possession he will treat it as executed (*s*). But the mere taking possession is in itself an equivocal act (*t*), and is not necessarily a waiver of the right to an inquiry. The Court must be satisfied that it was the intention of the purchaser to take

(*l*) *Pegg* v. *Wisden*, 16 Beav. 239.
(*m*) *Rae* v. *Geddes*, 18 Gr. 222.
(*n*) *Darby* v. *Greenlees*, 11 Gr. 353, 354.
(*o*) *Simpson* v. *Sadd*, 4 D. M. & G. 673.
(*p*) *Knatchbull* v. *Grueber*, 1 Madd. 170.
(*q*) *Gordon* v. *Harnden*, 18 Gr. 231.
(*r*) *Aldwell* v. *Aldwell*, 6 P. R. 183.
(*s*) *Fludyer* v. *Cocker*, 12 Ves. 27; and see *Fleetwood* v. *Green*, 15 Ves. 594, explained in *Burroughs* v. *Oakley*, 3 Swan. 165.
(*t*) *Simpson* v. *Sadd*, 4 D. M. & G. 672.

the land without such inquiry (*u*). And the act of taking possession is more lightly regarded in Ontario than it would be in England, where contracts of sale, and investigations of title are conducted with more care and solemnity than in this Province (*v*).

If possession is taken, not under the contract, nor by permission of the vendor, but forcibly, that is regarded as such an assumption of the right of property by the purchaser, irrespective of the state of the title, as amounts to a declaration on his part that nothing more remains to be done but the execution of the conveyance; and the purchaser will be taken to have accepted the title (*w*). If possession be taken after delivery of the abstract, and no provision as to possession is made by the contract, it lies on the purchaser to rebut the presumption that he has accepted the title as abstracted (*x*).

But where possession is taken in pursuance of the terms of the contract (*y*); or, the contract being silent, possession is taken prematurely by consent of both parties (*z*); or where the Court is otherwise satisfied that possession is taken without the intention on the part of the purchaser to waive his right, and the vendor so understands it (*a*); the purchaser's right to a good title is not impaired (*b*). Where an agreement for sale of building lots contained a stipulation that the purchasers might occupy and enjoy the property until default made in paying the purchase money, and the purchasers entered and erected two workshops on the land, it was held that they had not waived their right to an enquiry (*c*). So, where the purchasers, who were railway contractors, having a right by statute to take

(*u*) *Micheltree* v. *Irwin*, 13 Gr. 542.
(*v*) *Micheltree* v. *Irwin*, 13 Gr. 541; *O'Keefe* v. *Taylor*, 2 Gr. 307.
(*w*) *O'Keefe* v. *Taylor*, 2 Gr. 307.
(*x*) *Bown* v. *Stinson*, 24 Beav. 631.
(*y*) *Dixon* v. *Astley*, 1 Mer. 134; *Stevens* v. *Guppy*, 3 Russ. 171.
(*z*) *Vanconver* v. *Bliss*, 11 Ves. 458, 464; *Burroughs* v. *Oakley*, 3 Swan. 153.
(*a*) *Micheltree* v. *Irwin*, 13 Gr. 544.
(*b*) *O'Keefe* v. *Taylor*, 2 Gr. 308; and see *Crooks* v. *Glenn*, 8 Gr. 239.
(*c*) *Darby* v. *Greenlees*, 11 Gr. 351.

possession compulsorily, independently of any contract with the owner, took possession under a contract and commenced work on the land, it was held, on a bill filed by them for specific performance, that they were entitled to a reference as to title (*d*).

Where the purchaser at a judicial sale takes possession without leave of the Court, though with the consent of the parties, he impliedly accepts the title (*e*); but if an abstract be subsequently delivered the vendor re-opens the question of title (*f*).

If a purchaser lays the abstract before counsel who approves the title, his approbation cannot be taken, as against the purchaser, as a waiver of all reasonable objections (*g*). And where a case was submitted to counsel for his opinion as to the sufficiency of the evidence of an alleged intestacy, and it was therein stated that various other objections to the title had been waived or removed, it was held that the purchaser was not thereby obliged to relinquish his right to a reference on the whole title (*h*).

The preparation of the conveyance by the purchaser may be an important fact, as amounting to evidence that the parties have arrived at a stage of proceedings subsequent to the question of title; but that fact alone is apparently not sufficient to exclude the purchaser's common equity to an enquiry (*i*) In one case the vendor had prepared and executed a conveyance and retained it in a place of safety. He threatened to convey the land to a stranger and then leave the Province, and the purchaser thereupon declared in writing, in the presence of witnesses, that he intended to secure possession of the conveyance and register it. He subsequently did so. It was held under these circumstances

(*d*) *Jackson* v. *Jessup*, 6 Gr. 156, 159.

(*e*) *Patterson* v. *Robb*, 6 P. R. 114.

(*f*) *Aldwell* v. *Aldwell*, 6 P. R. 183.

(*g*) *Deverell* v. *Lord Bolton*, 18 Ves. 514; and see *Stewart* v. *Alliston*, 1 Mer. 33.

(*h*) *Lesturgeon* v. *Martin*, 3 Myl. & K. 255.

(*i*) *Burroughs* v. *Oakley*, 3 Swan. 171.

that he had not waived his right to an inquiry (*j*). Where a purchaser accepts a conveyance from one of several whose titles are identical, he will be concluded as to the titles of all (*k*). But acceptance of a conveyance from one tenant in common is no waiver of the right to an inquiry as to the title of the others, for they may have derived title from different sources (*l*).

Where the question is as to waiver of a particular objection only, it must be shown that it was brought to the knowledge of the purchaser; for, waiver being a question of intention, it could not be argued that the purchaser intended to waive that of which he had no knowledge. But if he takes possession, either he or his solicitor clearly knowing the objection to the title, but neither of them giving any intimation of it, he waives the objection (*m*), and can never set it up again unless entitled to do so by some act of the vendor's (*n*).

The nature of the objection is a matter of importance. If it be of such a nature that it cannot by possibility be cured, the purchaser should immediately insist upon it and refuse to proceed further with the contract; otherwise he may bind himself to complete the contract. So, where an estate of seventy acres was described in the particulars as freehold with leasehold adjoining, and it appeared that only eight acres were freehold; but the purchaser, having acquired knowledge of this, went on to treat as to the title, and the vendor cleared up all objections; it was held that the purchaser was bound to complete the purchase (*o*). And where a purchaser was under contract to buy an estate, which he learned for the first time from the abstract to be subject to a right of sporting over it, and went into

(*j*) *Mitcheltree* v. *Irwin*, 13 Gr. 538, 540.

(*k*) *McDonald* v. *Garrett*, 8 Gr. 293.

(*l*) *McDonald* v. *Garrett*, 8 Gr. 292.

(*m*) *Burnell* v. *Brown*, 1 J. & W. 175.

(*n*) *Burnell* v. *Brown*, 1 J. & W. 174; *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 231.

(*o*) *Fordyce* v. *Ford*, 4 Bro. C. C. 495; cited in *Drewe* v. *Hanson*, 6 Ves. 679.

possession, it was held that he was concluded by his act and could not avail himself of the objection (*p*).

But if the objection is one that may be cured, it will be matter for enquiry whether the purchaser committed the alleged acts of waiver in the expectation that the objection would be removed (*q*); and the continuance of negotiations is strong evidence that the purchaser did not intend to waive the objection, for a man by going on to treat does not waive an objection which he is continually insisting upon (*r*).

What amounts to taking possession was discussed in a late case (*s*). It was there laid down that the delivery of the key of a house is not of itself delivery of possession; it is but a symbolical delivery, but may be evidence of possession, if given or received with that view. In the same case it was held that letting the purchaser into receipt of rents and profits was not a compliance with the condition to give possession of one parcel, where another condition provided for letting the purchaser into the receipts of the rents and profits of another parcel.

(*p*) *Burnell* v. *Brown*, 1 J. & W. 168; and see *Ogilvie* v. *Foljambe*, 3 Mer. 53.

(*q*) *Calcraft* v. *Roebuck*, 1 Ves. Jr. 225.

(*r*) *Knatchbull* v. *Grueber*, 1 Mad. 170.

(*s*) *People's Loan & D. Co.* v. *Bacon*, 27 Gr. 294.

EDITORIAL REVIEW.

Speedy Foreclosure.

The cases on speedy foreclosure are multiplying, and though it is "almost a practice," as Chitty, J., says, it is not quite settled; but he adds, there is a tendency to give but one time to redeem.

The last English case is *Platt* v. *Mendell*, L. R. 27 Ch. D. 246. In that case the defendants were the mortgagor and other persons, who, the plaintiff alleged, claimed to have some charge on the mortgaged premises subsequent to the plaintiff's mortgage. They all appeared but did not deliver any defence; and so the plaintiff became entitled to such judgment as the Court considered him entitled to on his statement of claim. Mr. Justice Chitty gave but one day for all to redeem. The learned Judge reasons as follows:—The mortgagor alone has but one period of six months in which to redeem. He cannot by creating subsequent incumbrances gain any greater right. "It is anomaly," said the learned Judge, "to say that a mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem. In a complicated case where the mortgagor has so incumbered the equity of redemption as to give rise to questions of priority, it is clear, and I take it to be settled after the decision in *Bartlett* v. *Rees*, 12 Eq. 395, by Sir John Romilly, which has often been followed, that only one time is allowed for redemption, and that is not merely as regards all the persons claiming to be incumbrancers, or shown to be incumbrancers on the equity of redemption—incumbrancers therefore of the mortgagor; but the mortgagor himself has no further time allowed him to redeem, and there is only one time allowed as against all the defendants. * * If, however, the defendants in a foreclosure action have put in a defence, or appeared at the Bar, and have proved

their incumbrances, and there is no question of priority between them, it does appear that the course of the Court has been to make a judgment allowing successive periods for redemption, which, when examined in principle, will be found to be a judgment not only in favour of the plaintiff, but a judgment as between the co-defendants."

The principle is clear, as between the plaintiff and the mortgagor the plaintiff is entitled to his judgment absolute for foreclosure at the expiration of six months. This right of the plaintiff's cannot be taken away by subsequent dealings of the mortgagor with his equity of redemption. Any further extension of the time for redemption is for the benefit of the subsequent incumbrancers, and arose, as Mr. Justice Chitty points out, from the desire of Courts of Equity to do complete justice and to allow the defendants to take the benefit of the action.

In order to get the benefit of the action the subsequent incumbrancer must appear and ask for such a modification of the judgment in his favour as between himself and the mortgagor. Such a judgment is of course not the judgment which the plaintiff asks, and, if granted, derogates from the plaintiff's right of foreclosure within six months, which he clearly has. And, therefore, the result is that the mortgagor does, in fact, by subsequent dealings with his equity of redemption impair the plaintiff's right, if an extension of time is given to his assignee of the equity of redemption.

The distinction, then, pointed out by Mr. Justice Chitty between cases where the defendants do not appear, and cases where they do appear and ask for this extension of the period for redemption, does not appear to be quite sound, for the plaintiff's right must depend upon a principle and not upon the accident of the appearance of the defendants.

The principle that defendants may settle equities between themselves at the plaintiff's expense was distinctly repudiated in *Biscoe* v. *Ward*, 1 C. L. T. 129; and there appears to be no sound reason why the equities as to redemption, as well as other equities, should not be settled between defendants without delay to the plaintiff. The plaintiff

once paid off and disposed off the whole burden, delay and expense of adjusting equties between the defendants would then fall upon those who originally came in after him and subject to his rights, instead of, as at present, upon the plaintiff who suffers from the delay and increased expense of successive foreclosures.

In Manitoba, Mr. Justice Taylor has boldly followed the tendency of the modern cases and converted it into a practice. In *Rice* v. *Murray*, 2 M. L. R. 37, the bill was *pro confesso* against the defendant, the mortgagor. As there were subsequent incumbrances, it was necessary to take a reference. The learned judge, after reviewing the recent authorities (except *Platt* v. *Wendell*, not then reported) directed that but one period of six months should be allowed for all parties, mortgagor and subsequent incumbrancers, to redeem. An additional reason for thus shortening the time exists in this country, and is pointed out by Mr. Justice Taylor. He says, "I do not see how any injustice is done subsequent mortgagees by giving them only the same day as the mortgagor. They take their securities with notice through the registry office of any existing incumbrances ahead of them, which they may at any time be called upon to pay off in preservation of their own rights." And again he points out that this ancient right is a delusive one, for, "in the event of the prior mortgagee exercising the power of sale, which most mortgages now contain, they would not have even the six months to prepare for redeeming."

We hope this practice will soon be adopted in Ontario. A mortgagee generally forecloses for one of two reasons. First, the estate may be so valuable that foreclosure would be a cheap way of acquiring it. In that case a new loan could be readily negotiated. Secondly, the estate may be of so little value and so unattractive that he feels that the expenses of an attempted sale would be thrown away, and he therefore desires to make the most of the land by getting an absolute title to it in the hope of making it worth the mortgage money. In such a case redemption is an improbable event.

The Law Quarterly Review.

We have received the first number of this magazine which has already passed into a second edition, and which fulfils all the expectations that were entertained of it.

An able article on Federal Government, by Professor A. V. Dicey, is of special interest on this side of the Atlantic. The learned writer has a word to say respecting the Canadian Constitution. While displaying a great deal of theoretical knowledge, he has evidently not mastered the details of our charter. "The preamble," he says, "to the North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united with (*sic*) the Dominion 'with a constitution similar in principle to that of the United *Kingdom*.' If preambles were intended to express the truth, for the word '*Kingdom*' ought to have been substituted '*States*'; since it is clear that the constitution of the Dominion is modelled on that of the Union." This is true only in connection with the remark that the constitution is the law of the land. The constitution is in other respects, as has been frequently shown, very unlike that of the United States. Our Provinces are not States bound together by a treaty—immutable though it may be. They are subdivisions of a State—a subordinate one, perhaps better defined as a subordinate political society—for purposes of local government. And the legislation of the Provinces is subject to the supervision and constitutional control of the Dominion. The reserve powers lie with the Dominion, while in the United States the States have the reserve powers, and their legislation is independent of Federal control.

But even in connection with the remark to which we referred, the learned writer is not absolutely correct. For though the constitution is the law of the land, a portion of it, namely, "the Constitutions of the Provinces" (B. N. A. Act, sec. 92, s.-s. 1) may be amended from time to time by

the Provincial Legislatures, notwithstanding anything in the Act, except as regards the office of Lieutenant Governor.

Again, Bourinot (pp. 76, 694) is quoted for the proposition that the power to disallow Acts which are illegal or unconstitutional "was possibly given with a view to obviate altogether the necessity for invoking the law courts as interpreters of the constitution." It is difficult to conceive that the founders of the Dominion had any such purpose in view. For Acts which are illegal or unconstitutional cannot be made any more illegal or unconstitutional, or any less effective, than they are in their inception, by disallowance. If illegal or unconstitutional they are not Acts. The pages on which they are printed are blank pages amongst our laws. But Acts which interfere with the policy of the Dominion, as Dominion Acts which interfere with Imperial policy, though within the scope of legislative jurisdiction, may be proper subjects of disallowance by the superior or supervising power. And this, for the reason that, if not disallowed, they would become binding laws.

The other articles are Section 17 of the Statute of Frauds redrawn and illustrated, The Franchise Bill, The King's Peace, Homicide by Necessity, and some reviews. Some practical notes on current cases form an important feature.

Ego et Rex Meus.

Lord Blackburn delivers himself of this sentiment, though not quite in the same words, when he says, in *Bowen* v. *Lewis*, L. R. 9 App. Ca. 912:—"I wish to point out, more distinctly than I could do before, what is the only point on which I think there is a difference in opinion *between me and the Lord Chancellor*, and why I still think the judgment should be affirmed."

The Value of a Report.

A case of *Howard* v. *Lovegrove*, L. R. 6 Ex. 43, was cited to the Court of Appeal in *Williams* v. *Crow*, 10 App. R. 301, and this is how it was viewed.

Hagarty, C. J. O., says, at p. 306, "We have seen four reports of this case, and the facts seem to be widely different from the report in the Law Reports. It is very hard to understand."

Patterson, J. A., at p. 319, says, "The law, as thus definitely settled by all the decisions, adversely to the claim of the present plaintiff, does not seem to have been questioned again for nearly twenty years; but in *Howard* v. *Lovegrove*, L. R. 6 Ex. 43, decided in 1870, the opinions of the three learned Judges, Pollock, C.B., Martin, B., and Pigott, B., certainly seem to go the whole length required for the support of the judgment now in appeal. * * * These judgments were delivered in refusing a rule *nisi* to reduce a verdict by disallowing a sum included for extra costs between attorney and client. Reading the note of the argument of Prentice, Q.C., in moving for the rule, and the report of the judgments delivered, and noting the cases cited * * the point seems to have been understood both by Counsel and Judges to be the right to recover extra costs as damages upon a covenant for indemnity, after having already recovered taxed costs against the plaintiff in the former action. It is impossible, however, to gather that state of facts from the reporter's statement, or indeed to gain any clear idea of what the facts were. The case is also found in 33 L. T. N. S. 396, 19 W. R. 188, and 40 L. J. N. S. Ex. 13, and in those reports a more intelligible statement is given, although they differ somewhat in details, and do not give as full particulars as one would wish. It is left in doubt whether the taxed costs recovered by the plaintiff may not have been merely his costs after 'instructions for plea,' upon the claim of damages *ultra* the amount paid into Court, upon which issue the plaintiff had succeeded; and whether therefore the costs between attorney and client may not have referred only to the proceedings before payment into Court, on which the plaintiff could not have taxed any costs against the plaintiff in the former action. If this were so, the case would fall directly under the authority of

Nowell v. *Roake*, 7 B. & C. 404. But no suggestion to that effect can be gleaned from any of the reports of the case.

It is to be regretted that the reports are not more satisfactory.

It seems impossible to treat the case as a decision upon a definite state of facts; and for that reason the judgment cannot be regarded as overruling the long and unbroken chain of earlier decisions, however distinctly the opinions may seem to conflict with the views on which those earlier decisions were grounded."

The majority of the Court refused to follow the case.

REVIEW OF EXCHANGES.

Albany Law Journal.—5th July, 1884.

Restrictive Covenants in a Conveyance of Real Estate, by WILLIAM H. HAMILTON. Such covenants are classified as follows:—1. Those which are in general restraint on alienation. 2. Those which restrict it for a limited time. 3. Those which restrict it as to purchasers. The first are void. As to the second, the question is said to be unsettled, but the learned writer points out that the difference between the first and second is one of degree only, and not of principle. Under the third class there is an able discussion of covenants running with the land.

Ibid.—12th July, 1884.

Common Words and Phrases. Molestation; to; drop; show, indicate; presence; actual use; furniture; cruelty to animals; are defined.

Partnership by Participation in Profits, by GUY C. H. CORLISS. The following rules are submitted:—"1. When the recipient of profits has, by virtue of an agreement with another, a right to participate as principal trader in the management of the business out of which the profits are to arise, then he is a partner, and liable as such; and no secret intent not to become a partner, and no provision in the contract restricting his liability or exempting him from all liability, will afford him immunity from the responsibilities of a partner. 2. When the recipient of profits would, in the absence of any express provisions in the agreement to the contrary, have by virtue of such agreement a right to participate as principal trader in the management of the business, then he is a partner, even though he has expressly agreed that his associate in the business shall have the right to exercise conclusive control in conducting the business. 3. In all other cases the recipient of profits is not a partner, and cannot be held liable to creditors, unless he has estopped himself from denying that he is a partner."

Ibid.—19th July, 1884.

The Presumption of Survivorship, by JOHN D. LAWSON. Rule 1. There is no presumption as to the order in which two or more persons died who are shown to have perished in the same accident, shipwreck or battle. The law regards them as having died at the same instant. Rule 2. But where the calamity, though common to all, consists of successive events, separated from each other in point of time and character, and

each likely to produce death upon the several victims, according to the degree of the exposure to it, difference in age, sex or health may raise an inference of survivorship. Rule 3. And the one of several in a common danger which proved fatal to all who was last seen or heard alive within the operation of the cause of death, is presumed to have survived the others.

Ibid.—26th July, 1884.

Common Words and Phrases. Wholesale liquor dealer; retail liquor dealer; mechanic; needless torture or mutilation; heirs; merchant; bridge; rounding a point; wait; are defined.

The Presumption of Intent, by JOHN D. LAWSON. Rule 1. Where a person does an act, he is presumed in so doing to have intended that the natural and legal consequences of his act would result. Rule 2. Where an act is criminal *per se* a criminal intent is presumed from the commission of the act. Rule 3. But where a specific intent is required to make an act an offence, the doing of the act does not raise a presumption that it was done with the specific intent. Rule 4. The law presumes an intent from acts in the absence of declarations where the party is physically and mentally capable of forming an intent. Rule 5. A person is presumed to intend to do what is within his right and power rather than what is beyond them.

Ibid.—2nd August, 1884.

The Presumption of Payment, by JOHN D. LAWSON (continued and concluded in two following numbers.) Rule 1. Independently of a statute of limitations or in the absence of one, after a lapse of twenty years the law raises a presumption of the payment of bonds, mortgages, legacies, taxes, and judgments, and the due execution of a trust. Rule 2. The presumption under Rule 1. does not arise from lapse of time alone short of twenty years; but a shorter time, in connection with other circumstances, may raise a presumption of fact that payment has been made. Rule 3. A statute of limitations prohibits the action after the legal period; but the presumption of law arising from lapse of time may be rebutted, and the term fixed by the statute of limitations cannot be shortened by lapse of time alone. Rule 4. The presumption of payment may be rebutted under Rule 3 by showing (at any time during the period which creates the presumption) an acknowledgment of the debt by the debtor; or a payment of part of it, or a known or notorious insolvency or incapacity of the debtor; or by evidence of the relation, situation, or intention of the parties; or by other circumstances explanatory of the delay. Rule 5. A presumption of payment other than by lapse of time will arise from the presumption of a receipt from the creditor; from the possession by the debtor of the security or obligation, or from its cancellation; from the payment of a later debt; from the passing of money between debtor and creditor after the debt is due from the custom of trade; or from other circumstances raising an inference of payment. Rule 6. The pre-

sumption in Rule 5 [concerning possession or cancellation of the security] does not arise where the debtor had the means of obtaining possession of or of cancelling the obligation other than by paying it, nor [concerning payment of a later debt, and passing of money] where the debt paid was not the debtor's alone. Rule 7. The presumption of payment is stronger than the presumption of continuance, but weaker than the presumption of innocence.

Ibid.—*23rd August*, 1884.

The Extradition of Eno, by GEORGE H. ADAMS. A discussion of some of the leading cases on extradition. The decision of Mr. Justice Caron in the case in question is criticised adversely.

Ibid.—*20th September*, 1884.

Common Words and Phrases. Lodger; moderate speed; soil, rubbish, filth; debt; ferry; literary or scientific; voucher; game; settle; bar; standing by; are defined.

Ibid.—*27th September*, 1884.

Presumptions from Alterations of Instruments, by JOHN D. LAWSON. Rule 1. Alterations, erasures and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execution or completion. Rule 2. But where the alteration is in a different handwriting from the rest of the instrument; or in a different ink; or is in the interest of the party setting it up; or is suspicious on its face: or the execution of the instrument is denied under oath, the burden of proof rests on the party producing the instrument to explain it to the satisfaction of the tribunal.

Ibid.—*11th October*, 1884.

Remedies for Defective Quality on Executory Contract of Sale or Manufacture, by ANDREW GILHOOLY. Where there is no express term of quality or fitness the implied term of merchantable quality or fitness for a special purpose operates, not as a warranty, but as a condition merely, and is waived by acceptance. Where there is an express agreement as to quality or fitness, creating merely an obligation which the law would imply in the absence of such agreement, it does not change the nature or extent of the obligation or the remedy upon it. Where there is an express agreement as to quality or fitness importing a greater obligation than the law would imply in the absence of such agreement; or where a certain quality or fitness for a particular purpose, whether *intra* or *ultra* the legal imputation is warranted in express terms; in either case the express contract operates, not only as a condition before acceptance, but also as a warranty after acceptance. English and American authorities are cited.

Ibid.—25th October, 1884.

Common Words and Phrases. Family; clause; gaming; production of labour; rates and taxes; lodger; lottery; commit, make; manufacture; are defined.

Ibid.—6th December, 1884.

Compensation of Husband who acts as Wife's Agent, by DAVID STEWART. Express contracts between husband and wife are in most States void, but in cases where they can and do contract she may be garnisheed by his creditor; but in the absence of a contract a creditor cannot garnishee. There is no implied contract that a wife will pay her husband for his services.

American Law Register.—July, 1884.

Discrimination in Railway Facilities, by ADELBERT HAMILTON. Starting out with an arraignment of Railway Companies for manifest partiality in dealings with the public, exhibited in discriminations in traffic rates, special facilities for cheap transportation, etc., to large shippers, the learned writer proceeds to lay down the general rules binding upon the Companies as common carriers and public agents; and to consider to what extent, if at all, they are permitted to discriminate between customers. It would appear from the cases cited, that the Courts pay due and full regard to considerations of public policy in supervising the acts and contracts of such corporations, and that parties whose interests are prejudicially affected by improper acts of the Companies need only apply to have their wrongs redressed.

Ibid.—August, 1884.

Allowances for Maintenance and Education, by HAMPTON L. CARSON. English and American cases are examined to discover how far allowances for maintenance and education of infants will be directed by the Courts, where the infants have parents wholly or partially unable to support and educate them according to their stations and expectations in life. "The principle common to all these cases, with but few variations, is that the minor's station in life, his expectations, the surroundings to which he has been accustomed, as well as his father's ability to sustain the same scale and degree of expenditure are all to be considered by the Court in every particular reference. An allowance, extravagant in one case, may be moderate and proper in another. A just conclusion can be reached only after an attentive consideration of all the circumstances. Though the older authorities rigorously insist upon the common law duty of the father to maintain his children exclusively out of his own means, and narrowly restrict the scale of expenditure, yet recent cases proceed upon a far more liberal principle, justly holding that the truest interests of infants, where their expectations are great, are not best served by the accumulation of dollars, but by judicious expenditures calculated to fit them to fill with decorum their proper stations in life."

Ibid.—September, 1884.

Railway Insurance, by ADELBERT HAMILTON. The subject is treated under the following heads: (i) Who may effect insurance, and what is insurable; (ii) Form of the contract. Authority of agent; (iii) Consideration; (iv) Liability of Insurance Company and of Railway Company to shipper; (v) Subrogation of Insurance Company; (vi) Subrogation of Railway Company; (vii) Defences.

Ibid.—October, 1884.

Possession by Husband and Wife, by DAVID STEWART. Three questions are discussed; whether any presumption arises as to the ownership of property possessed jointly by husband and wife and used by both; whether there can be delivery between husband and wife of such property; and whether the continued use and enjoyment of such property by the grantor after the transfer is evidence of fraud. At common law a wife had no property in possession, and her possession was that of her husband; and if evidence of title, it was evidence of his title. Notwithstanding the doctrines of equity as to separate estate, and their partial adoption by the statute law, the shadow of the rule at common law still remains, and the presumption still exists that all property in and about the family home is the husband's and is in his possession. But when the title is the wife's, the husband's possession is her possession. Neither can rely upon the mere fact of possession to prove acquisition of title from the other. But the purchase money of property bought by the wife in her own name is presumed to have been her husband's. There can be no such thing as adverse possession between husband and wife living together. The cases cited are very numerous.

American Law Review.—November-December, 1884.

The New British-American Extradition Treaty, by EDWIN F. CONELY. The learned writer confines himself mainly to a statement of the practical working of the Ashburton Treaty, and of the different views entertained of the effect of that treaty by the governments which were parties to it. It appears that while the first international extradition treaty entered into by the Republic was that with Great Britain in the year 1794, it has entered into at least forty since, of which the most meagre and unsatisfactory is the one which should have been most full and comprehensive—the Ashburton Treaty of 1842. In criticising this treaty, the learned writer justly questions how far the avowed object of excluding offences having a political tincture is met by including the very crimes under which a politically criminal charge could be most speciously concealed, and excluding others, equally heinous, the nature of which would render it next to impossible to use them fraudulently as a means of reaching political offenders, such as rape, burglary, child-stealing and embezzlement. The principles of extradition recognized by the United States are given in detail, and reference is made to the Imperial Statutes passed in relation to this subject. It is disappointing to find in this interesting article little more than a passing reference to the subject of its title.

The Rights and Duties of Corporations in Dealing with Stock held in a Fiduciary Capacity, by FRANCIS B. PATTEN. A corporation is a custodian of the title of the real owner of its shares, and is bound to exercise due care in the preservation of that title. What is due care in dealing with fiduciaries, such as administrators, executors, assignees, guardians and trustees? Each class is dealt with separately.

Popular Errors in the Law of Conveyancing. by C. G. TIEDEMAN. The errors treated of are (i) that a deed *proprio vigore* conveys the legal title to freehold estate in lands; (ii) That the trustee must join with the married woman in the conveyance of her separate estate; (iii) That a sealed instrument is by the common law necessary to convey a freehold estate. The assertion that all these propositions are erroneous, when expressed in the words given and without limitation, may not command immediate assent. As explained in the argument, the operation of local statute law is not considered, and other limitations must be added. While the authorities collected may be found useful in protecting a title which is impugned, professional conveyancers in this Province very generally find it a safer course to avoid, as far as possible, running counter to a popular error possessed of as much claim to respect as those mentioned. It is not an advantage to leave a title open to continual question at every transfer, however good it may actually be.

Liability of Municipal Corporations for Negligence, by H. E. YOUNG. Conflicting decisions of the Supreme Court of Massachusetts and the Supreme Court of the United States form the text. English and American cases are referred to. "Few can doubt that the rule which now obtains in England and in almost all the United States is the correct one. Municipal corporations—and townships, counties, etc.,—are now clothed with full power to keep their streets and highways in order; and they should be required to do so. Townships, counties, etc., are now generally made liable by statute. They undertake the duty, and have funds to keep the streets in order; and if they by their neglect of duty inflict injury upon any one, they should be held liable for it. To establish this rule is the only way to enforce diligence. The enforcement of it by indictment experience shows is futile."

Ibid.—January-February, 1885.

American Institutions and Laws, by JOHN F. DILLON. A reprint of an address delivered before the American Bar Association at Saratoga Springs, N. Y., in August, 1884. The merits of the common law, as compared with the civil law, and the possibility and expediency of codification are the principal topics touched upon.

The Right to Emblements upon Foreclosure of Mortgages on Real Estate, by ROSTAN BETTS. Where the estate of the mortgagor has terminated by default, he becomes tenant at will of the mortgagee, and any crop sown by him upon the land pending such tenancy goes to the mortgagee, if standing at the latter's entry upon determination of the

will. As tenant at will, the mortgagor has no assignable estate which a lessee of the lands can enjoy, and neither such lessee nor a purchaser of the crops from a mortgagor holding over can hold the crops planted subsequent to default and standing on the land against the mortgagee or his vendee entering under the mortgage. After default the mortgagor has no authority to lease, nor is there any privity of contract or estate between his lessee and the mortgagee, the latter being free to treat the lessee as trespasser or tenant, as he may elect. The above doctrines appear to be the law of all the States save Ohio and Pennsylvania, the Courts of which hold the mortgagor or his lessee entitled to emblements on account of the uncertainty of the former's estate. The learned writer presents an able argument in support of the doctrines most generally received, which are those upheld in this Province. See *McDowall* v. *Phippen*, 1 O. R. 143.

The Lowell Bill—Bankruptcy of Partners, by ALFRED MACK. In treating of certain clauses of a bankruptcy bill recently introduced into the United States Senate, a discussion is had of the relative rights of firm creditors and separate creditors in insolvency, and English and American rules and decisions are referred to.

English Lawyers of Recent Times, by HUGH WEIGHTMAN. Mr. Justice Talfourd, Lord Chief Justice Cockburn and Mr. Edwin John James form the subject of the article.

Central Law Journal.—10*th October*, 1884.

Liquidated Damages, by ELISHA GREENHOOD. Concluded in the following number. The subject is discussed under the following heads: Penalties in general; principles governing construction; when penal words employed; bonds; application of rules; distinction between specialties and parol contracts; stipulated damages "over and above" actual damages; recovery releases covenantor; acceptance of part performance—effect of; effect of partial waiver. English, Canadian and American cases are cited.

Ibid.—17*th October*, 1884.

Directors of Corporations, by JOSEPH A. JOYCE. Concluded in the following number. The subject is dealt with under the following heads: Authority of directors in general; character of powers; duties required of directors; degree of care to be exercised by them; general liability; how far liable for mistakes; acts of subordinate agents; how far bound to know material facts; burden of proof.

Ibid.—24*th October*, 1884.

Contract of Carriers Limiting Liability for Negligence to a Specified Sum, by BENJAMIN F. REX. "It is now well settled in most of the States, and in the Federal Supreme Court, that contracts exempting common carriers completely from responsibility for their own or their servants' negligence are void." So as to contracts for partial

exemption. Contracts limiting the right of recovery to a certain agreed value are valid. They cannot limit their liability by notice merely; except where the notice is for non-liability for goods of a designated class, unless the contents are disclosed. Acceptance of a bill of lading or receipt binds the shipper, unless given under peculiar circumstances leading the shipper to believe it a mere receipt, whereupon he fails, without negligence, to read it. Contracts and clauses limiting liability are strictly construed.

Ibid.—31*st October*, 1884.

Damages for Employer's Breach of Contract for Services for Specified Period, by EUGENE MCQUILLIN. The old doctrine is stated to be that where one contracts to employ another for a certain time at a specified compensation for the whole period, and discharges him without cause before the expiration of that period, he is bound to pay the whole amount of wages for the full time. The modern rule allows the recovery of only such damage as actually accrues to the servant.

Ibid.—7*th November*, 1884.

Good-will, by ELISHA GREENHOOD. Sales of good-will—"the probability that the old customers will resort to the old place"—are dealt with first, and then, good-will of partnership.

Preferences by Directrs in their own Favour. ANONYMOUS. "It is not only settled that the directors may make preferences between creditors, but such preferences may be made in their own favour when they themselves are creditors of the corporation. Of course in such cases they must act with the utmost good faith, and the transaction to be upheld must be free from the taint of fraud and suspicion." American cases are cited.

Ibid.—14*th November*, 1884.

Additional Compensation for Additional Burdens to Owners of Property abutting on Streets, by ISAAC H. LIONBERGER. Cites American cases.

Presumptions in Partnership Law as to Allowance of Interest and Compensation, Shares and Liability of Incoming Partners, by R. E. B. Cites American, and one or two English cases.

Ibid.—28*th November*, 1884.

Gifts inter vivos, by W. L. MURFREE, Sr. English and American cases are reviewed.

Implied Warranty of Solvency of Bills and Notes, by CHAS. A. BUCKNAM. In *Lightbody* v. *The Ontario Bank*, 11 Wend. 1; 13 Wend. 101, it was held that notes of an insolvent Bank given in payment of a debt would not discharge it, for they were without value. This decision is adversely criticised.

Ibid.—5th December, 1884.

Substantial Performance of Contracts, by JNO. F. KELLY. "At law the rule is that a contract must be strictly performed according to its terms. In equity a substantial performance is sufficient, but with the incident of compensation when proper and just."

Ibid.—12th December, 1884.

Implied Promises, by SEYMOUR D. THOMPSON. Concluded in the following number. Three propositions are stated. 1. That a promise will not be implied contrary to the real understanding of the parties. 2. That a moral obligation will not support an implied promise, and perhaps not an express promise. 3. That a request is necessary to raise an implied promise. These propositions are discussed, and shown to be somewhat qualified.

Liability of Holders of Nominally Paid-up Stock, by B. F. REX. English and American cases are cited.

When Creditor may proceed against Estate of deceased Partner, by GUY C. H. CORLISS. The doctrine of *Devaynes* v. *Noble*, 1 Mer. 529, has been repudiated by several of the States.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

LONGWAY v. AVISON.

Justice of the Peace—Action against—Immediate return of conviction.

In an action against two Justices of the Peace to recover a penalty for not making an immediate return of a conviction had before them to the Clerk of the Peace,

Held, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and

Held, also, that in a *qui tam* action the jury's finding upon such a question is conclusive.

REGINA v. HALL.

Unregistered Medical Practitioner—Conviction quashed.

The defendant, who was agent for a dealer in medical instruments, undertook to cure one P. of cancer by friction or irritation of the surface of the body and application thereto of a certain oil, receiving as remuneration $3 a visit, which he stated was for the medicine, being its actual cost. He admitted he had practised in Germany and that he imported

the specific in question by the gross. It also appeared that he prescrib other medicines for the patient besides the oil.

Held, that this was practising medicine, and that the defendant w rightly convicted of doing so for gain and hope of reward, without regi tration under the Medical Act; but

Held, that the conviction must be quashed in consequence of t magistrate's having, against the protest of the defendant's counse shortened the adjourned period fixed for giving judgment.

MOLSON'S BANK v. TURLEY.

Principal and surety—Alteration of liability—Release of surety.

The defendant, at the instance of the plaintiffs' manager, endorsed th note of C. to secure an advance to the latter on grain. It was represented to the defendant by the plaintiffs' manager that the giving of his nam was a mere formal matter; that only 75 per cent. of the value of th grain could be advanced; that warehouse receipts would be taken, and that he would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representations of the plaintiffs' manager, as the jury found, that it would not alter his position, to sign a guaranty under seal, which, though not intended, as the plaintiffs' manager stated, to vary the defendant's original liability, as a matter of fact did so by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which the defendant became liable as endorser.

Held, that the guaranty was void as against the defendant and that the plaintiffs could not recover upon it, and that it was not necessary to prove that the Bank manager knew when he made it that his representations were false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representations of the agent.

GIBSON v. MICHAEL'S BAY LUMBER CO.

Charter party—Demurrage—Computation of time—Sunday.

Held, reversing the judgment of Armour, J., at the trial, Armour, J., dissenting, that, in computing demurrage, Sunday is to be reckoned as one of the days to be allowed, for "days" means running days or consecutive days unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed.

REGINA v. BUNTING *et al.*

Criminal law—Conspiracy to bribe members of Provincial Legislature—Pleading.

On demurrer to an indictment for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the Legislature to vote against the Government,

Held, O'Connor, J., dissenting, (i) that an indictable offence was disclosed; that a conspiracy to bribe members of Parliament is a misdemeanor at Common Law, and as such indictable; (ii) that the jurisdiction given to the Legislature by R. S. O. cap. 12, secs. 45, 46, 47, 48, to punish as for a contempt does not oust the jurisdiction of the courts, where the offence is of a criminal character; but that the same act may be in one aspect a contempt of the Legislature, and in another aspect a misdemeanor; (iii) that the Legislature has no criminal jurisdiction and hence no jurisdiction over the matter considered as a criminal offence.

Per O'Connor, J. (i) The bribery of a member of Parliament in a matter concerning Parliament and Parliamentary business, is not an indictable offence at Common Law, and has not been made so by any statute; (ii) in all matters and offences done in contravention of the law and constitution of Parliament, with the exception of treason, felony, and breaches of the peace, Parliament alone has jurisdiction, and the Courts, civil and criminal, have no jurisdiction; (iii) the *lex et consuetudo Parliamenti* reserve to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members and its business, with the above three exceptions.

Irving, Q.C., for the Crown.
Richards, Q.C., *Foster*, *Murdoch*, and *Meek*, for the defendants.

CONWAY v. C. P. R. Co.

Railway Act—Fencing—Squatter—Negligence.

Held, that the defendants, a railway company, are not bound to fence except as against a "proprietor or tenant," and consequently that the company were not liable to a mere squatter for the killing of his horses without other negligence on their part than their omission to fence as against him.

Osler, Q.C., and *Gorman*, for the plaintiff.
H. Cameron, Q.C., and *White*, for the defendants.

REGINA v. LACKIE.

Criminal Law—Fraudulent removal of goods—11 Geo. II. cap. 19, sec. 4—Defendant compelled to testify.

The fraudulent removal of goods by a tenant, is, under 11 Geo. II. cap 19, sec. 4, a crime; and a conviction therefor was consequently quashed with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution.

Shepley, for the motion.
G. H. Watson, contra.

REGINA v. SMYTH.

Patent of invention—35 Vict. cap. 26—Delivery of model.

Held, that 35 Vict. cap. 26 (D), does not require delivery of a model prior to the issue of a patent of invention.

In this case, after the granting of the patent, the Commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of a model. The model was sent, whereupon the patent was forwarded.

Semble, that delivery of the model prior to the grant of the patent was dispensed with.

Gormully, for the demurrer.
Foster, contra.

BRICE v. MUNRO.

Action for unpaid shares in foreign company—40 Vict. cap. 43, sec 47 (D). Non-issue of execution in Ontario—Pleading.

In an action by a creditor of the Morton Dairy Co., Limited, against the defendants to recover the amount of unpaid shares in that company, under 40 Vict. cap. 43, sec. 47 (D), the head office of the company being in Quebec, where the plaintiff's judgment against the company had been obtained and execution returned thereon unsatisfied, a demurrer to the statement of claim was allowed, because it did not appear that an execution in Ontario against the company had been returned unsatisfied.

Shepley, for the demurrer.
Lash, Q.C., contra.

In re WOODMAN & THE TOWN OF LINDSAY.

Drainage by-law—Use of sewer without leave—Validity of by-law.

A municipal corporation passed a by-law for the construction of a sewer without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, etc., enacting that no one should drain into it without permission from the Municipal Council, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no formal leave to use the sewer, but several members of the Council gave him permission to connect some closets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege.

Held, that the sewer was constructed for general drainage purposes including that of closets; but that the permission given to the applicant so to use it did not bind the Council, which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate provided by the by-law; and the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first.

Semble, that even if he had the legal right to use the sewer, either the corporation or the local Board of Health could, under 47 Vict. cap. 32, sec. 13, and cap. 38, sec. 12, have passed a by-law compelling him to cut off his connection.

Quære, whether, after the formation of the local Board of Health, the by-laws provided for by 47 Vict. cap. 32, sec. 13, should be passed by the corporation or by the Board of Health under cap. 38, sec. 12.

The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the Council.

Hudspeth, *Q.C.*, for the motion.
Aylesworth and *Martin*, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, FEBRUARY, 1885.

STUART v. McKIM.

Garnishment—Money in hands of Speaker of Legislative Assembly—Form of issue.

The defendant, a member of the Legislative Assembly of Ontario, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the

Hon. Charles Clarke, the Speaker of the Assembly, to await the action of the Assembly with regard to the alleged bribery. The plaintiff, a judgment creditor of the defendant, issued an attaching order attaching all debts due from or accruing due from the Speaker to the defendant, claiming that the money so handed to the Speaker became a debt payable to the defendant.

The Court, Galt, J., dissenting, without expressing any opinion as to the merits, directed an issue to be tried, under Rule 370, as to the garnishee's indebtedness.

The form of the issue was subsequently settled by the Registrar, namely, whether at the date of the service of the attaching order upon the garnishee, there was any debt due or accruing due from the garnishee to the defendant.

An appeal to the Divisional Court by the garnishee was dismissed, the Court holding that the issue so settled by the Registrar was sufficient.

W. F. Walker, for the plaintiff.
J. G. Scott, Q.C., for the appeal.
W. H. P. Clement, contra.

COPELAND v. CORPORATION OF BLENHEIM.

Municipal Corporation—Highway—Negligence—Contributory negligence.

A building was being erected on a street in the Village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement, planks, for the distance of twenty feet, had been removed from the sidewalk, and the earth taken away so as to form a grade into the basement. There were three openings in the basement wall, one in the centre for a door, and one on each side for windows. Where the doorway was, there was a hole made by the grade into the cellar. Planks were laid across the open space on the sidewalk. During the day time a plank was laid from the board across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. The plaintiff, who knew of the dangerous character of the place, was, on the night in question, about seven o'clock, going along the sidewalk, and while in front of the building met two persons, and in endeavouring to get out of their way he struck against something and fell into the hole and was injured.

Held, that the defendants were guilty of negligence in leaving the hole unguarded; and that there was no evidence of contributory negligence on the plaintiff's part.

Pegley, for the plaintiff.
Meredith, Q.C., for the defendants.

GALBRAITH v. IRVING.

Solicitor and client—Security for costs—Misdirection — Adding parties—Assignment of reversion or future rent—Chose in action.

The defendant was lessee of certain premises from D. An instrument was signed, but not sealed, by D., stating that, in consideration of certain costs owing by him to the plaintiff in certain cases named and other matters and cases, "I hereby assign and transfer unto the said G. H. Galbraith (the plaintiff) a certain lease dated, etc., and made between John Irving (the defendant) to me, covering the premises known, etc., together with all rents now due or to accrue due from the said John Irving or his assigns in respect of said lease, and the term thereby created." The plaintiff brought an action on this instrument to recover rent which accrued due after the making thereof. At the trial the learned Judge charged the jury that, while the plaintiff remained the solicitor for D., he could not take any security for his benefit; and that he should have first severed that connection between them, and let D. have independent legal advice.

Held, misdirection.

Held, also, that D. was not a necessary party; for if such a state of facts existed as would constitute fraud, it might be raised without D. being a party. Nor was she such, even if defendant desired to obtain relief over against D., for the plaintiff had nothing to do with this, as it would be only to protect both parties that D. would be added. A new trial was granted, unless the plaintiff desired the Court to consider matters not raised on the argument, namely, whether the assignment was of the reversion or of future rent issuing out of the land, and therefore void as not being under seal; or whether it could be supported as an assignment of a *chose in action*, namely, of the moneys payable under and by virtue of the covenants of the lease.

The plaintiff in person.

Elgin Myers, for the defendant.

McCRAE v. BACKER.

Sale of land—Title to land—Condition precedent to payment of purchase money—Costs—Damages.

On the 2nd May, 1882, the plaintiff agreed to sell and the defendant to buy, certain land for $856, payable $156 on the execution of the agreement and the balance on the 1st January, 1883, without interest; and the defendant covenanted to pay the said sums; in consideration whereof the plaintiff covenanted to convey, or cause to be conveyed, the lands to the defendant free from encumbrances, and to permit the defendant to occupy them until default. The agreement also provided that the defen-

dant might assume possession of the land and collect the rent then due from M., the tenant, and make arrangements with him for giving up possession. The defendant took possession, when he was turned out by M., who claimed the land and had registered a *lis pendens* against it. Ejectment was then brought and judgment recovered against M., when his solicitors undertook to remove and did remove the *lis pendens*, the defendant having been kept out of possession a year. In an action by the plaintiff against the defendant for the purchase money, the defendant set up as a defence that on 1st January, 1880, the plaintiff could not give an unincumbered title to the land by reason of the *lis pendens*; and also counterclaimed, contending for the costs of the ejectment action, and for damages by reason of being kept out of possession.

Held, by Cameron, C.J., following *McDonald* v. *Murray*, 2 Ont. R. 573; 3 C. L. T. 208, that the showing a good title by the plaintiff was not a condition precedent to his right to recover the purchase money.

Held, by Rose, J., that apart from this the plaintiff was entitled to recover; that the defendant could have no claim for the costs unless there was an unqualified agreement to pay them; but as it appeared that the plaintiff on his own statement intended to pay some portion, he should be charged with half; and the plaintiff should be disallowed interest for the time the defendant was kept out of possession.

BOULTBEE v. BURK.

Statute of limitations—Part payment.

It is not sufficient to establish the mere fact of part payment in order to take a debt out of the statute of limitations. The part payment must be such that a jury may fairly infer a promise to pay the remainder.

In this case where payments were made, there was evidence from which such inference could be drawn, and the learned judge who tried the case having found that there was a promise to pay the remainder, the court refused to interfere.

H. J. Scott, Q.C., for the plaintiff.
Tilt, Q.C., for the defendant.

ADAIR v. WADE.

Seduction—Assessment of damages by judge without jury, validity of—Service of writ of summons—Evidence of—New trial.

In an action of seduction, no appearance was entered. The plaintiff then filed a statement of claim, to which no statement of defence was entered, and interlocutory judgment was signed and notice of assessment

of damages given. At the trial the defendant did not appear, and a jury was called, but upon their disagreement the learned judge discharged them and tried the case himself without a jury, upon a fresh taking of evidence, and gave judgment for the plaintiff and assessed the damages.

Quære, whether, under the Judicature Act and former practice, the learned judge had power to try the action and give the judgment therein; but

Held, that it was not necessary to decide this point, inasmuch as it was not satisfactorily established that the writ of summons had been served upon the defendant. The defendant was thereupon allowed to file a statement of defence, and a new trial was directed, the judgment and execution to stand meantime as security.

Aylesworth, for the plaintiff.
J. K. Kerr, Q.C., for the defendant.

BURNETT v. HOPE.

Partnership—Death of partner—Contract of hiring.

When a contract of hiring is entered into between a person and a firm, and afterwards one of the partners dies, the death of such partner puts an end to the contract.

Elgin Myers, for the plaintiff.
Moss, Q.C., and *Crerar*, for the defendants.

THE ROYAL INSURANCE CO. v. BYERS.

Insurance—Fraud and Misrepresentation—Right to recover back money paid.

In an action to recover money paid by the plaintiffs to the defendant in settlement of a claim under a policy of insurance, the plaintiffs alleging that they had been induced to make the payment by the fraud and misrepresentation of the defendant,

Held, that the evidence failed to show any fraud or misrepresentation; and if there were any, it was unintentional; and further, that the plaintiff had never offered to, and possibly could not place the defendant in his original position; and that no amendment of the form of action could be made which would avail the plaintiffs.

Held, therefore, that there could be no recovery.

Moss, Q.C., and *Clute*, for the plaintiffs.
Britton, Q.C., and *Dickson, Q.C.*, for the defendant.

In re DE SOUZA.

English barrister—Right to practice in Ontario—Admission through the Law Society of Upper Canada.

Held, that an English barrister, as such, is not entitled to practice at the bar of Her Majesty's Courts in this Province, but that he must be admitted to practice through the Law Society of this Province.

The applicant in person.

Robinson, Q.C., and *Walter Read*, for the Law Society.

WEBSTER v. HAGGART.

Arbitration—Consent reference—Right to appeal.

At the trial of an action the following order was made:—"Upon the consent of the parties I do order and direct that the matters in dispute between the plaintiff and defendant upon the issues joined in this action be referred," etc It was urged that as the action involved the investigation of long accounts and was therefore such an action as would have been referred compulsorily, the consent must be taken to be to the arbitrator named and not generally to the reference, and that there was therefore a right to appeal from the award in the merit, but

Held, that the reference was a consent reference, and there was no appeal.

Osler, Q.C., and *Justin*, for the motion.

H. P. Milligan, contra.

CLENDENNING v. TURNER.

Wharf—Navigable waters—Tolls—Injury to wharf—Negligence.

The defendant built a wharf on the shore of the island opposite Toronto, with the permission of the Commissioner of Crown lands for the Province of Ontario. It was claimed, however, that the water lots in front of the island, or at all events the free access to and from the shore, over the waters of the Bay was vested in the city of Toronto by grant from the Crown. The defendant claimed to exact tolls from the plaintiff for using the wharf; and also for damage done to the wharf by negligence and want of care in the management of his boat.

Held, that it was not necessary to decide as to the ownership of the soil under the water in question, that the relationship and dealings of the parties as disclosed by the evidence shewed that no tolls were to be charged; that the wharf was constructed on the navigable waters of the Bay; and,

assuming that the Commissioner of Crown lands had power to grant the license, it did not give power to charge tolls from vessels landing passengers at it, for the public had the right to reach the shore of the island over the waters of the Bay; and the plaintiff having been invited by the proprietor of Hanlan's Point, near which the wharf was situate, the lessee of the Corporation, to land passengers then he had the right to land upon the wharf which prevented his reaching the shore at that point.

Held, however, that the defendant was entitled to recover the damages claimed for plaintiff's negligence, as he was not at liberty to either negligently or wilfully use or exercise his rights so as to injure the defendant's wharf.

Allan Cassels, for the plaintiff.
Laidlaw, for the defendant.

MACKIE v. PEARSON.

Absconding Debtors Act—Attachment—Creditors' Relief Act.

On 27th September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th a writ of attachment against defendant as an absconding debtor was issued and placed in his hands, under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October two more writs of attachment were placed in his hands. On 13th October the sheriff sold under the two executions and realized enough to satisfy them, which moneys remain in his hands pending these proceedings. On 20th October the sheriff received a certificate issued under and pursuant to the Creditors Relief Act 1880, and on the 24th of same month received a further certificate under the said Act. On 26th he sold the balance of defendant's property so seized by him and realized the sum of $2,908.37, for, as he said, distribution amongst the creditors. After this various executions and certificates were received by him. On the 14th October the sheriff, pursuant to the Creditors' Relief Act, made the entry in his book. The attaching creditors had not placed executions in the sheriff's hands.

Held, that the proceedings under the Absconding Debtors Act should prevail as against those under the Creditors Relief Act; and that the creditors who had certificates under the Creditor's Relief Act should obtain judgment and execution in the ordinary way so as to come within the provisions of the Absconding Debtors Act.

Street, Q.C., H. J. Scott, Q.C., Gibbons, W. H. P. Clement, Shepley, and *Henderson*, for the various parties.

CLARKE v. RAMA TIMBER, ETC., Co.

Canal—Dam—Damage by overflow—Findings—New trial.

The defendants built a canal from a point on the St. John River Lake St. John, and from thence to Lake Couchiching, under power co ferred on them by their act of incorporation, 31 Vict. cap. 66. Th plaintiff, owning land near Lake St. John, brought an action against th defendants claiming (i) that by the erection or continuance of a dam b the defendants in the bed of the St. John River, which was the natur outlet of Lake St. John, the waters of the Lake were prevented fro flowing away from his land; and by not keeping the dam in repair; th plaintiff suffered damage; (ii) that by the construction of the cana waters which would not otherwise have flowed into Lake St. John, di flow into it, and damaged the plaintiff's land. The jury gave a verdic for the plaintiff.

Held, that their should be a new trial to ascertain whether the damag alleged was caused by the dam or the canal; and if by the latter whethe by any negligence of the defendants or by *vis major*.

J. K. Kerr, Q.C., for the plaintiff.
McCarthy, Q.C., and *Arnoldi*, for the defendants.

LEADLEY v. McLAREN.

Sale of Goods—Statute of frauds—Acceptance.

Action to recover the purchase money of a large quantity of wool, namely, 39,538 lbs. of white wool at 24cts. per lb., and 11,652 lbs. of black wool at 21½cts. per lb. under an alleged contract.

Held, Cameron, C.J., dissenting, on the evidence disclosed in the case, that there was no contract within the statute of frauds so as to bind the defendant; nor any acceptance to take the case out of the statute; that as to the black wool the contract was only for some 10 sacks; and that although plaintiff spoke of being able to procure for defendant the same quantity no contract was ever entered into for it; and as to the white wool although defendant had on different occasions received some 10 and 20 sacks respectively, it was only for the purpose of testing the quality of the wool and not as an acceptance under the contract.

Held, therefore that plaintiff could not recover.

McMichael, Q.C., for the plaintiff.
McLaren, for the defendant.

DONOVAN v. HERBERT.

Ejectment—Insolvent Act of 1875, Sec. 68—Proceedings under—Validity—Possession—Damages.

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of one D. It appeared that prior to the issue of the writ of attachment in insolvency, D. had conveyed the property to his brother. Two of the creditors claimed that the deed was fraudulent, and made a demand under Sec. 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the other creditors, refused to do; and thereupon these two creditors obtained an order from the County Judge authorizing them to take proceedings on their own behalf in the name of the assignee; such proceedings under the said sections to be for their own benefit. Proceedings were thereupon taken by these creditors and the deed set aside, and the land was recovered and sold, and upon an order obtained from the County Judge a conveyance was made by the assignee to the purchaser under whom the plaintiff claimed. The defendant contended that the deed was void under sec 75, because it was not authorized by the creditors at their first meeting, or any subsequent meeting specially called for the purpose, or by the inspector.

Held, Rose, J., dissenting, that the deed was valid; that it depended entirely on the provisions of sec. 68, and was in no way affected by sec. 75, and therefore the sanction of the creditors was not essential to its validity; but at any rate the defendant, a mere stranger to the insolvency proceedings could not avail himself of the objection.

McMichael, Q.C., for the plaintiff.
McCarthy, Q.C and *Wallace Nesbitt*, for the defendant.

[Rose, J., 15th January, 1885.

REGINA v. YOUNG.

Brewers—Sale of liquors manufactured.

Held, that brewers licensed to manufacture under a Dominion license are licensed to sell, by wholesale, the liquor manufactured by them in places other than that named in the license.

Cattanach, for the motion.
Delamere, contra.

[27TH JANUARY, 1885

CLENDENAN v. GRANT.

Speedy judgment—Rule 324.

Judgment under Rule 324 granted on a covenant of indemnity, where liability thereon was not denied, on the plaintiff's showing that he was being sued in respect of the matters against which the defendant covenanted to indemnify him.

On the 10th January, 1885, a writ was issued, endorsed as follows:—"The plaintiff's claim is for damages for breach of covenant to indemnify the plaintiff against the covenants made by the plaintiff with Donald Mitchell McDonald in four several indentures of mortgage, each dated the 1st of December, 1881, to pay $500 (making $2,000 in all), with interest thereon, as in said mortgages specified, and costs."

On 21st January, 1885, the Master in Chambers gave leave to serve notice of motion for judgment under Rule 324.

The plaintiff's affidavit showed that the plaintiff had conveyed certain land to the defendant subject to certain mortgages on which the plaintiff was liable on his covenant. The defendant covenanted, in the said conveyance as follows:—"The said party of the third part for himself, etc., covenants with the said party of the first part (the plaintiff) that he will well and truly pay the mortgage moneys from time to time as the same become due and payable, and observe and perform the covenants and conditions herein contained, and will hold and keep harmless the said party of the first part from the payment thereof and the interest thereon, and of and from all loss, costs and charges and damages which the said party of the first part may at any time or times be put to by reason of or on account of any neglect or default in payment of said mortgage moneys, or the non-observance of the provisoes and conditions in said mortgage contained."

The affidavit further showed that the defendant had allowed the interest on the mortgages to fall into arrear, and that the plaintiff had in consequence been sued on them; that judgment was about to be signed against him; that the defendant had frequently promised before and after the commencement of the action against the plaintiff to pay the mortgages; and that there was no defence to this action as the plaintiff believed.

The plaintiff's solicitor swore that he had served the writ on the defendant and explained the nature of the plaintiff's claim to him; and that the liability was admitted.

J. B. O'Brian, for the plaintiff, moved for judgment under Rule 324, and asked for a reference to assess the damages.

A. H. Meyers, for the defendant, opposed the motion, on the ground that it was not shown that there was any danger of losing the debt.

ROSE, J., 27th January, 1885, made the following order:—"That the plaintiff have leave to enter judgment forthwith against the defendant

for the amount of the principal money secured by the four several mortgages mentioned in the writ of summons, amounting in all to two thousand dollars, and of the interest thereon according to the terms thereof, and his costs of suit, including the costs of this application; and that the amount of said interest may be made to appear to the Registrar of this Division by, etc.

"And it is ordered that the defendant may apply to be released from the judgment in this action after satisfying the holder of the mortgages so that the action against the plaintiff herein (by the holder of the mortgages) is withdrawn, and his said costs paid, and so that no further action will be brought against the plaintiff herein in respect of the said mortgages."

[12TH FEBRUARY, 1885.

REGINA v. HOLLISTER.

Market by-law—Conviction—Costs.

A by-law requieed "All hay, straw, grain, coal, farm produce and animals sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weigh scales." A conviction under this by-law was that the defendant brought into the town of Cornwall certain hay, etc,, and had the same weighed on scales other than the public scales of said town, the same being in contravention of the market by-law and amendments thereto of said town.

Held, that the conviction was bad in not stating that the hay was sold at the market or elsewhere, and must therefore be quashed. As the complainant was the weighmaster and had instituted the prosecution for his own benefit after warning, instead of bringing an action in the Division Court, he was ordered to pay the costs.

Aylesworth, for the applicant.

Cattanach, contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 12TH FEBRUARY, 1885.

WEST v. PARKDALE.

CARROLL v. PARKDALE.

Municipality—Ultra Vires—Performing work outside limits.

The judgment of Wilson, C.J., 4 C. L. T. 584, was affirmed.

Per Boyd, C.—The village corporation has no capacity conferred upon it by municipal legislation to act as agents for other corporations. These

municipalities have large original powers directly conferred by the Legislature involving the construction of and the interference with streets and highways within their territorial limits, but there is no law enabling them to act in the execution of such work as the representatives of other limited corporations. So, on the other hand, whatever rights may be exercised by the Railway Companies under orders in Council and Railway Acts, they as corporations have no power to delegate any part of these rights and privileges to municipal bodies, nor have municipal bodies any capacity to receive or exercise any such delegated functions. The action of the Parkdale authorities in this case was not as agents of the Railways, but as principals doing work which the municipality was not legally authorized to undertake. As a corporation, Parkdale entered into the construction contract with the people by whom the work was actually done, and so have become liable as a corporation for the injurious consequences to the plaintiffs resulting from that work.

Per Proudfoot, J.—The order in Council imposes no duty, and confers no right upon the defendants in regard to the construction of the subway. It is strictly confined to the Railway Companies, and authorizes *them* to do all the works requisite.

The defendants were not acting under their municipal powers—for these did not extend to works beyond their own boundaries, as are the works in this case, and the proper steps had not been taken as required by the Municipal Act.

They may employ agents, engineers, overseers, and workmen; but they cannot act in that capacity. Assuming it to be necessary to show the Act complained of to be within the scope of their authority in order to make them liable therefor, it is shown here; for by taking the proper steps under the Special Act, 46 Vict. cap. 45 (O) they might have executed the work in question. Not having done so they are trespassers; but within the scope of their authority, and therefore liable.

McCarthy, Q.C., Osler, Q.C., and *J. H. McDonald*, for the appeal.
S. H. Blake, Q.C., Lash, Q.C., and *Snelling*, contra.

[THE DIVISIONAL COURT, 23RD FEBRUARY, 1885.

SMITH v. GREEY.

Foreign Commission—When granted.

Held, on appeal, affirming the order of Proudfoot, J., that a commission should not be granted to take evidence abroad till after issue joined in the action, and not unless it be shewn on affidavit what evidence the party seeking the commission expects to obtain.

Arnoldi, for the plaintiff.
H. D. Gamble, for the defendant.

[20TH DECEMBER, 1884.

CANADIAN LAND AND EMIGRATION CO. v. DYSART *et al.*

Court of Revision—Fraud—Jurisdiction—Costs—Stay of proceedings pending an appeal.

Motion for an injunction to restrain the Court of Revision of the Municipality of Dysart, from raising the assessment of the plaintiffs' wild lands in the municipality. The plaintiffs set up in their statement of claim that they had appealed in respect of their assessment as being too high, to the said Court of Revision, and that the members of the said Court of Revision, by a fraudulent conspiracy amongst themselves, and from interested motives, in face of facts leading obviously to a contrary conclusion, and without any evidence to support the same, had not only dismissed the appeal, but, on a cross appeal brought in respect of the said assessment as being too low, had greatly increased the amount of the said assessment.

Held, on demurrer *ore tenus*, that inasmuch as the appeal lay from the Court of Revision to the stipendiary magistrate, the plaintiffs should have appealed accordingly, and could not come to this court for an injunction, at least until they had exhausted their other remedies.

The above judgment having been given, the plaintiffs applied for a stay of proceedings pending a re-hearing or appeal.

Held, that there was jurisdiction to make the order, which could go upon terms.

At any time before formal judgment issued by the court the judgment delivered or a part of it, may be recalled, and a term imposed or a charge made.

The defendant delivered a statement of defence in the action, but before any evidence was given at the trial, demurred *ore tenus*. The plaintiffs contended that under these circumstances, the defendants should be allowed no more costs than if they had demurred to the statement of claim and succeeded on the demurrer.

Held, that the dismissal of the action must be with costs.

[4TH FEBRUARY, 1885.

WRAY v. MORRISON.

Easement—Owners in severalty of halves of a house—Implied grant—Natural right of support.

In 1878 G. W. conveyed by a voluntary deed to M. W., his wife, certain land by metes and bounds. There were several houses on the lot, but no reference was made to them in the conveyance in any way. In 1883, also

by a voluntary deed, M. W. re-conveyed, by metes and bounds, to G. W. one half of the lot so conveyed by him to her in 1878. In this conveyance no reference was made to the houses on the land. In 1884, M. W. died leaving all her property, real and personal, to M., the defendant, an adopted child, by general devise. One of the houses above referred to, as being on the lot conveyed in 1878, was so situate that half the house was on the lot reconveyed by E. W. to G. W. in 1883, and the other half was the half of the lot retained by M. W. Shortly after the death of M. W., the defendant M. began to threaten G. W. that she would pull down and demolish the half of the said house which was on the half of the lot claimed by her under the devise of M. W., and on January 8th, 1885, actually commenced to tear down the sheeting which was round the base of the said half of the house, with a view as was naturally admitted, of carrying out her threats.

G. W. now moved for an *interim* injunction to restrain M. from forcibly interfering with the house, or with one C., a tenant of the house, placed therein by G. W. in the lifetime of M. W., and for a mandatory order for repair of damages already done, and by consent the motion was turned into a motion for judgment. The plaintiff rested his case chiefly on the doctrines of implied grant, and the natural right to support.

Held, that the plaintiff was entitled to a perpetual injunction and order of restitution as asked.

A. H. F. Le'roy, for the plaintiff.

Tilt, Q C., for the defendant.

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FACTORS AND THE FACTORS ACTS.

THE manner in which the requirements of commerce have revolutionized some of the leading doctrines of the common law can be well exemplified by following the legislation affecting factors; and it is also interesting to see how the necessity for such legislation arose.

The aim of the Factors Acts is the protection of persons dealing with those having the possession of goods or the documents of title.

Possession has always been regarded as a very strong element in determining the right of ownership of personal property; but no title to goods would pass under a sale by one wrongfully in possession, except where the law of market overt applied, or where a negotiable instrument was being dealt with, or a sale was made by a pawnee or a sheriff. Mere possession gave no right to confer title.

One of the earliest relationships recognized by our law was that of principal and agent; and, without entering into any discussion of the rights and duties of agents in general, it would be well to bear in mind the classification which now exists and the broad principles governing them which apply to Factors as well as other agents.

Agents are either universal, general, or special. Universal agents are those appointed to do all acts which a principal can personally do, and which he may lawfully delegate authority to another to do.

General agents, *i. e.*, those who may do all acts connected with a particular trade, business, or employment, may be divided into two classes, viz.: Those whose authority is limited by the nature of the business in which their principals are engaged, having regard to the acts to be performed, and whose business and the rules and regulations under which it is carried on limit the agent's scope. Of the former class, the manager of a trading company, where ample authority is well exemplified in the case of *South of Ireland Colliery Co.* v. *Waddle* (*a*), is a good illustration; and of the latter, a broker; and it has been laid down as a general rule that agency includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency: and even a deviation by the agent from the appropriate course will not vitiate his act if it be immaterial or circumstantial only and does not in substance exceed his right or duty (*b*).

A special agent is one authorized to do some particular act or make some particular contract.

A factor is a general agent whose powers are limited by the nature of the business in which he is engaged. The following definition may be referred to: "A factor is an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation commonly called factorage or commission" (*c*).

As we have already stated, the Factors Acts were for the protection of those dealing with persons in possession of goods or documents of title. The requirements of commerce demanded that the powers of agents should be enlarged; and that merchants should be enabled to obtain advances on their goods when shipped, by drawing on their agents with the Bill of Lading, the agents in their turn to have a lien for advances thus made, with a power to pledge the consignment and protect one who might in turn advance to them. Thus the fact of possession would become more nearly

(*a*) L. R. 3 C. P. 463.
(*b*) *Story* on Agency, 9 Ed. 101.
(*c*) *Story* on Agency, 9 Ed. p. 36.

proof of, at any rate, a right to deal with goods, and the agent's powers would be greatly expanded. The powers of a factor at Common Law are well stated in *Cole* v. *North Western Bank* (*d*), where the effect of the various statutes, then in force, is also dealt with. At page 363 Blackburn, J., says, "The proposition that a Factor is not by his employment authorized to pawn or pledge goods intrusted to him, was for many years much controverted in point of fact, but it having been decided as a matter of law that he was not so authorized the courts adhered to what had been decided." The decisions on which this doctrine is founded are *McCombie* v. *Davis* (*e*), *Martin* v. *Coles* (*f*), *Phillips* v. *Huth* (*g*), in the first of which the pledge by a broker of the goods of his principal as his own was referred to by Lord Ellenborough as a "tortious pledge."

A factor at Common Law had only power to sell, and in considering the Factors' Acts it is important also to observe that the persons whose dealings with property or documents in their possession are protected, are persons intrusted therewith as factors or agents, not persons to whose employment a power of sale is not commonly incident, as wharfingers or warehouse keepers, and that the transactions within the statute are mercantile transactions (*h*).

English Factors Acts.—The first Factors Acts passed in England were 4 Geo. IV. cap. 84, and 6 Geo. IV. cap. 94, and an abstract of them will be found in *Cole* v. *North Western Bank* (*i*), at page 361.

The Acts referred only to persons intrusted with the symbols of the goods, and not the goods themselves, and gave the person in whose name the goods were shipped the rights of a true owner, so far as to entitle the consignee to a lien for an advance made without notice that such person was not the actual owner, and such person was taken to

(*d*) L. R. 10 C. P. 354.
(*e*) 7 East 5.
(*f*) 1 M. & S. 140.
(*g*) 6 M. & W. 572.
(*h*) *Smith's* Law of Contracts, 7 Ed. 443.
(*i*) Supra.

have been *intrusted with the goods* for the purpose of con signment or sale *unless the contrary were made to appear* A *person intrusted with* the bill of lading, etc., was also to b deemed a true owner, so as to give validity to any sale o pledge if the buyer or pawnee had not notice that such person was not the actual owner.

A pledge by such person for a pre-existing debt gave only to the pledgee the right of the person making the pledge.

The Acts also protect persons purchasing goods from agents entrusted with them, notwithstanding they have notice of the agency, if the purchase be made in the usual course of business without notice of want of authority in the agent to sell or receive the price.

Pledges by a factor or agent were also protected, notwithstanding notice of the agency, but no right was acquired further than that possessed by the factor or agent at the time of the pledge (*j*). Some of the defects of these Acts were that they only referred to persons intrusted with the possession of the documents of title, and not of the goods themselves, so that a pledge of the goods remained as before the Act, unprotected; that an advance made on one day upon a promise to deposit the documents on the following day which was actually done was not within the Act, it being said that such an advance was only made on the faith of a promise of the documents; and that a deposit of documents of title given in exchange for other documents of title which had been properly pledged was not protected (*k*). The law remained unaltered in England till the statute of 5 & 6 Vict. cap. 39 was passed, and this corresponds very closely with the Act in force in Ontario, R. S. O. cap. 121.

This Act remedied all the defects referred to, and much extended the rights of factors.

Some very important decisions were given on the effect of this statute. We will refer to three. They are *Fruentes*

(*j*) L. R. 10 C. P. at p. 361.

(*k*) 2 Jur. 201 (1842).

v. *Montis* (*l*), *Johnson* v. *Credit Lymais Co.* (*m*), and *Van Casteel* v. *Booker* (*n*).

In *Fruentes* v. *Montis* the facts were as follows:—The plaintiffs had an agent in England for the sale of their wines. He had some sherry in his possession for which he had dock warrants. The plaintiffs not being satisfied with him revoked his authority and appointed other agents in his place. In ignorance of this, the defendants made an advance to the discharged agent on the dock warrants. On an interpleader to try the title to the goods, it was held by the Court of Common Pleas, and their decision was affirmed on appeal, that the revocation put an end to the agent's authority, and that he could not thereafter validly deal with the goods. At page 284, Willes, J., says, "I therefore come to the conclusion that the person who is to create a valid pledge of his principal's goods must be an agent who is intrusted at the time of doing the act which is to have that effect. That being so, it appears to me that an agent whose authority has been revoked and who wrongfully retains possession of goods which he is bound to give up at the time when he purports to make a pledge, is not an agent at all, but a wrongdoer, and is not within the Acts, nor is the pledge a transaction within their protection. And I can no more come to the conclusion that a person who is in possession, but has ceased to be intrusted and ceased to be agent, can have a right to pledge, so as to confer upon the pledger the rights created by the Factors Acts, than I can come to the conclusion that a person who was intrusted but who has ceased to be in possession can have such right, which he clearly could not."

The effect of this decision, which is important in other references to the law of factors, as far as our law is concerned, will be presently referred to.

In *Johnson* v. *Credit Lymais Co.*, the facts were these. One Hoffmann, a tobacco merchant, had a quantity of

(*l*) L. R. 3 C. P. 268, and in appeal, L. R. 4 C. P. 93.
(*m*) L. R. 2 C. P. D. 224; in appeal, L. R. 3 C. P. D. 32.
(*n*) 2 Exch. 691.

tobacco in bond in his name, which was purchased by the plaintiff, but no change was made in the books of the Dock Company, and Hoffman remained the ostensible owner. The plaintiff, not wishing to pay the duty, then left the dock warrants with Hoffman, which was an ordinary transaction in the tobacco trade. Hoffman then pledged these goods with the defendants for advances, and gave them the dock warrants. In an action brought to recover the tobacco, it was held that the transaction was not within the Factors Acts, and that the plaintiff had not intrusted Hoffmann as his factor or agent with the documents of title, and the decision was affirmed on appeal. At page 238, Denman, J., says, "The only real question in this case is rather one of fact than of law, viz.: in what capacity was Hoffmann intrusted by the plaintiff. Upon this question I have no doubt whatever that the proper answer to give upon the facts admitted and proved is, that the only capacity in which Hoffmann had any possession after 31st December, 1875 (the date of sale) was that of a paid vendor retaining the dock warrants solely for the convenience of the vendee, who preferred to postpone the time of delivery."

In *Van Casteel* v. *Booker*, it was decided that the plaintiff had no title under the Factors Acts, inasmuch as they were not intrusted with the bill of lading by the true owner, but claimed to hold in their own right.

The English Factors Act, 40 and 41 Vict. cap. 39, contains provisions which render the three decisions just referred to no longer law in England. Section 2 applies to such a state of facts as was presented in *Fruentes* v. *Montis*, and declares that a *bona fide* pledge or purchase shall not be defeated by a secret revocation.

Section 3 enacts that where the vendor, or any one on his behalf, continues in possession of the documents of title, any sale, etc., made by such person shall be valid if made without notice to the purchaser of any previous sale, and would apply to *Johnson* v. *Credit Lymais Co.* And section 4 provides that where the vendee obtains possession of the documents of title from the vendor, any sale or

pledge by such vendee shall be valid; thus getting rid of the effect of *Van Casteel* v. *Booker*. And section 6 extends the right of stoppage in transitu to the *bona fide* transferree of any document of title to the same extent as that belonging to a transferror of a bill of lading.

There is no Act corresponding to this last Statute in Ontario, so that the decisions of *Johnson* v. *Credit Lymais Co.* and *Van Casteel* v. *Booker* would apply in this Province.

Factors Acts of Ontario, R. S. O. cap. 121.—Until the passage of C. S. C. cap. 59 (now R. S. O. cap. 121), intituled "An Act respecting contracts in relations to goods intrusted to agents," which is nearly a copy of the English Act 5 & 6 Vict. cap. 39, the rights and liabilities of factors were regulated solely by the Common Law, as no Act that was ever passed in England had any force in Ontario, all English legislation having taken place since the year 1792 (*o*).

We propose to examine some of the sections on which decisions have been given.

Section 1, sub-section 4.—Documents of title "shall include every bill of lading, warehouse keeper's or wharfinger's receipt, or order for delivery of goods, every bill of inspection of pot or pearl ashes, and every other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery the possessor of such document to receive the goods thereby represented." At Common Law, bills of lading are representatives of the property for which they have been given, and their endorsement and delivery transfers the property from vendor to vendee. It is a complete legal delivery of the goods, divests the vendor's lien (when endorsed and delivered by the vendee to a subsequent purchaser); and now, by R. S. O. cap. 116, sec. 5, sub-sec. 1, the vendee shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading

(*o*) See *Doe dem Anderson* v. *Todd*, 2 U. C. R. 82.

had been made with himself (*p*). "The actual holder of an endorsed bill of lading may undoubtedly by endorsement convey a better right than he himself has. It is at variance with the general principle of law that a man should be allowed to transfer to another a right which he has not, but the exception is founded in the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument for the general convenience of commerce, has been allowed to have an effect at variance with the general principles of law" (*q*).

It might reasonably be concluded from the above that the finder of an endorsed bill of lading could make title by transferring it for value to a *bona fide* purchaser without notice, but such is not the case. A bill of lading is negotiable in the sense only that a vendee to whom it has been endorsed may by endorsement and delivery make title to the goods, and defeat the right of stoppage in transitu; in other cases he can only convey, by negotiating the bill of lading, such title to the goods as he himself has (*r*).

The Statute declares that wharfingers' or warehousekeepers' receipts, etc., are instruments used in the ordinary course of business as proof of the possession or control of goods, and authorizing the possessor of such documents to receive or transfer the goods thereby represented.

It was considered that such documents were like bills of lading, that their *endorsement and delivery put the endorsee in possession* of the goods therein specified.

"Special juries of London merchants have *repeatedly* volunteered the statement that this is what they understand the paper to mean, that it is not a mere *offer* or *token* of authority to receive possession, but is meant by the parties to be an actual transfer of possession. In *Lucas* v. *Dorrien* (*s*), Dallas, C.J., said, in relation to a West Indian dock warrant, 'I have been several times stopped by a special jury, they being satisfied that the goods passed

(*p*) *Lickbarrow* v. *Mason*, 1 S. L. C. 753.
(*q*) *Jenkins* v. *Usburne*, 7 Man. & G. 698.
(*r*) *Gurney* v. *Behrend*, 3 E. & B. 633.
(*s*) 7 Taunt. 278.

from hand to hand by the endorsement of these instruments.' All special juries cry out with one voice that the practice is that the produce lodged in the docks is transferred by endorsing over the certificates and dock warrants" (*t*), and it was so held in two cases at Nisi Prius, *Zwinger* v. *Samuda* (*u*) and *Keyser* v. *Suze* (*v*). Notwithstanding all this, the law is now settled that the endorsement and delivery of these documents of title do not transfer the possession, but only the right to possession, and until the bailee is notified and attorns to the endorsee he continues to hold the goods for the consignee.

In *Farina* v. *Home* (*w*), the leading case on this point, the purchaser refused to pay for the goods for which the dock warrant had been endorsed and delivered to him. He relied on the statute of frauds, setting up that there had been no delivery to and receipt by him of the goods. The plaintiff argued that the endorsement and delivery of the dock warrant was sufficient to satisfy the statute. Verdict for defendant. Parke, B., delivering the judgment of the court said, "This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint, and the wharfinger holds the goods as the agent of the consignee, who is the vendor's agent, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him; then, and not till then, the wharfinger is the agent of the assignee, and then only is there a constructive delivery to him; in the meantime the warrant and the endorsement of the warrant is nothing more than an *offer to hold the goods* as the warehouseman of the assignee. The case is the same in principle as that of *Bentall* v. *Burn* and others, which are stated and well discussed in a recent work of Mr. Blackburn, on the contract of sale, pp. 27, 41 and 297, and in Mr. Addison's work, p. 70. We all, therefore, think that though there was sufficient evidence of the

(*t*) *Benj.* on Sale, 4th Am. Ed. sec. 817.
(*u*) 7 Taunt, 265.
(*v*) Gow 53.
(*w*) 16 M. & W. 119.

acceptance, there is none of the receipt "(x). See also *Gunn* v. *Bolckow* (y). Here we have the legislature backed by the opinion of the mercantile community declaring that the transfer of these documents of title effected a constructive delivery of the goods to the transferee, and the courts deciding that such transfer only conferred a right to the possession of the goods, a state of affairs it was said in *Fruentes* v. *Montis*, legislation alone could remedy. The legislature in England has, as noted above, come to the rescue, but in Ontario the remedy is still to be applied.

Sections 2 & 3.—Any agent intrusted with the possession of goods or of the documents of title thereto, shall be deemed the owner for the following purposes, that is to say:—

Sub-section 1. To make a sale or contract as in the fifth section mentioned.

2. To entitle the consignee of goods consigned by such agent to a lien thereon for any money or negotiable security advanced or given by him to or for the use of such agent, or received by the agent for the use of the consignee in like manner as if such agent were the true owner of the goods.

3. To give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made with such agent as well for an original loan advance on payment made upon the security of the goods or documents as for any further or continuing advance in respect thereof.

4. And to make such contract binding upon the owner of the goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien has notice he was contracting only with an agent.

Section 3. Every agent in possession of goods or documents of title as aforesaid shall for the purposes of this Act be taken to have been intrusted therewith by the owner unless the contrary be shewn in evidence.

In *Barns* v. *Swanson* (z), Blackburn, J., first drew attention to the word "unless the contrary is shewn in evidence," in section 3, and gave it as his opinion that the

(x) 16 M. & W. 119.
(y) L. R. 10 Ch. App. 491.
(z) 4 B. & S. 270.

effect of those words was to enable the owner to set aside a sale or pledge if he could displace the presumption raised by the agent's possession of the goods, by showing that he had not entrusted the goods for the purposes indicated in the Act; and in *Fruentes* v. *Montis* (supra), this view was adopted; and, as we have already shown, even had the owner entrusted the goods, if he could show that he had revoked that authority before the pledge or sale, no matter how notorious the entrustment or how secret the revocation, still the owner would not be bound by the pledge or sale, for it was necessary that the entrustment should exist up to the completion of the contract of pledge or sale. Section 15 of R. S. O. cap. 95, however, provides that every payment made, and every act done under and in pursuance of any power of attorney, or any power, whether in writing or verbal, and whether expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act to whom the fact of the death or of the doing of such act as last aforesaid was not known at the time of such payment or act *bona fide* done as aforesaid, and as respects all claiming under such last mentioned person.

This section does not add to, or subtract from, the authority of a factor in any particular; it only relates to the determination of his agency. It prevents the owner from repudiating a contract made by his factor whom he has actually clothed with such authority, by proving a subsequent revocation, unless he show that the purchaser had knowledge of the revocation before he contracted with the agent. *Baines* v. *Swainson* and *Fruentis* v. *Montis*, except as to the subsequent revocation, though altered by statute in England, are law in Ontario.

The words "an agent entrusted with the possession of the goods or documents of title" (section 2) do not include a vendee (*a*), because he holds in his own right and not as agent.

(*a*) *Jenkins* v. *Usburne*, 7 Man. & G. 678.

"The singular anomaly thus exists that if a merchant buying goods and paying the price receives a transfer of the dock warrant, he will be safe if his vendor *is not owner* but only agent of the assignor of the warrant; and will not be safe if the *vendor is owner*, because the price may remain unpaid to the assignor of the warrant, and this is the necessary result of the conflicting interpretations put on the dock warrant by the Legislature and the Courts. The original owner is held by the Statute to have abandoned his *actual possession* by giving the document of title to his agent, although he retains *ownership* and *right of possession*, he is held by the Courts to have retained his actual possession when he gives the documents to a purchaser, although he has abandoned both ownership and right of possession" (*b*).

If an owner consign his goods to a wharfinger for custody only, and that wharfinger happens to be a factor also, and disposes of those goods in the latter capacity, the vendee receives no title; the wharfinger is simply a bailee, a servant or caretaker; he has not been intrusted with the goods in his capacity as a factor, which intrustment only is within the Factors Act (*c*).

Monk v. *Whittenbury* was an action of trover. The plaintiff succeeded. It has, however, been held in Ontario that trover will not lie against a carrier who, with notice from an unpaid vendor, delivers to an insolvent purchaser (*d*). It would appear from *Vickers* v. *Heitz* (*e*) that a person intrusted with goods, though not for sale, could make title; but Lord Westbury's judgment has been in all subsequent cases viewed as meaning simply that a factor who falsely represented to his principal that he had already sold the goods, and thereby had obtained the possession of the goods, was not *dehors* the Act and could make title.

(*b*) *Benjn.* on Sale, 4th Am. Ed. sec. 818.

(*c*) *Wilkinson* v. *King*, 2 Camp. 335; *Monk* v. *Whittenbury*, 2 B. & Ad. 484; *Cole* v. *N. W. B.*, L. R. 10 C. P. 354; *City Bank* v. *Barrow*, L. R. 5 App. Ca. 664.

(*d*) *Childs* v. *N. Ry.*, 25 U. C. R. 165.

(*e*) L. R. 2 H. L. Sc. 113.

All contracts pledging or giving a lien upon any such document of title shall be deemed a pledge of, and lien on, the goods to which it relates, and the agent shall be deemed the possessor of the goods or documents of title, whether the same are in his actual custody or are held by any other person for him or subject to his control.

In *Portalis* v. *Tetley* (*f*), cotton was consigned for sale by Portalis to Joyce & Co., who deposited the Bill of Lading with Cook, and subsequently made a further pledge to Overend, Gurney & Co. of the balance of the net proceeds by order in writing communicated to and assented to by C. It was contended that Joyce could not make a valid pledge to Overend & Co., because he had neither possession of the goods nor the Bill of Lading.

It was decided, however, that Joyce & Co. were, as against their principal, still in possession of and intrusted with the bill of lading, the principal not having revoked the authority.

Commenting on this section and speaking of the words, "or one held by any other person for him or subject to his control," Wood, V.C., in *Potalis* v. *Tetley*, said, "The plain interpretation of that, to my mind, is that when the factor has pledged them to a broker or to any one else for a debt which does not exhaust the whole value of the goods, they are in his control being in the possession of another person subject to his control and on his behalf to the extent to which they are not exhausted by the previous pledge. That pledge might be redeemed by him at any time, and in the eye of the court the goods are in his possession and under his control subject to the question of the debt being paid off. But with that his principal has nothing to do. He has not intervened, he has not revoked his authority, and at any time until that happens the factor remains, as it appears to me, the possessor of the goods which are simply pledged liable to redemption, because the person who holds them subject upon redemption to his control and on his behalf."

(*f*) L. R. 5 Eq. 140.

Section 8. No antecedent debt owing from any agent intrusted as aforesaid shall authorize any lien or pledge in respect of such debt nor shall it authorize such agent to deviate from any express orders or authority received from his principal.

What is an antecedent debt has been the subject of several decisions, and the conclusion to be arrived at from reading them is that if the factor were to pledge the goods for a personal liability, whether it may or may not have ripened into a debt existing before the pledge, the transaction is concerning an antecedent debt. There must be a present advance. It must be in money; there must be a change of the money going to the principal (*g*). In *Kaltenbach* v. *Lewis* the facts, so far as they concern us at present, were these; Meyer, a factor, made large purchases of shell-lac through the defendants as his brokers. Meyer did not say that he was acting for himself, so he may have acted for an unknown principal; nor did the defendants disclose that they were agents, and so as between them and the vendors they were liable to pay, though as between themselves and Meyer he was the person liable. On 20th February, 1880, Meyer applied to the defendants for an advance of £3,000 on a Bill of Lading to enable him to make a payment for some shell-lac then purchased, which was due next day. The defendants accordingly gave him a cheque for £3,000 on that security, and Meyer next day gave them a larger check in payment for the shell-lac. This was held a good pledge, for the defendants as a matter of fact did not know for whom the shell-lac was bought. It might have been for the plaintiffs. They must know that the pledge is for an antecedent debt of the pledgor; and further, Meyer at the time of the pledging was not indebted to defendants, as they had not paid for the shell-lac. In the ordinary course of business they advanced money on a Bill of Lading, and it happened that next day the pledgor gave them money to pay, *not themselves*, but other persons from whom he had bought shell-lac.

(*g*) *Learoyd* v. *Robinson*, 12 M. & W. 745; and see *Macnee* v. *Gorst*, L. R. 4 Eq. 315, where *Lewan* v. *Whitworth*, 2 Eq. 692, is explained; *Kaltenbach* v. *Lewis*, 24 Ch. Div. 54.

Section 9.—Such contracts only shall be valid as are herein mentioned, and such loans, advances, exchanges only shall be valid as are made *bona fide* and without notice that the agent making the same has no authority so to do, or that he is acting *mala fide* against the owner of the goods.

This is a general section, and taken alone, it would seem to indicate that a person in possession of goods who *had no authority to sell or pledge* might do either. Certainly the decisions are, that to be within the Act the agent must be in possession *qua* factor, and that possession *includes power to sell*. If the section said "without authority to pledge" it would be quite clear. "This latter proviso shows that the framer of the Act remembered that a factor might, as between him and his principal, be restrained from selling, except on particular terms, *or possibly forbidden to sell at all*; and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this secret restriction, but bad as regard those who had" (*h*).

If the agent is "forbidden to sell at all," then he is certainly not a factor. Yet, contrary to all prior decisions and the spirit of this decision itself, he would seem to be within the Act. We would suggest that what is meant is that such contract would be good if the agent only had power to sell to certain persons, or on certain terms, *or at certain times*. It might be that the factor's instructions were to sell only when the market was at a certain height, but it cannot mean that the contract would be good if he had no power to sell *or pledge at any time*.

In order to render a pledge valid, it is not necessary that the factor should be intrusted with the goods to pledge; authority to sell is sufficient, for the Statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other (*i*).

Section 11.—Where any loan or advance is *bona fide* made to any agent intrusted with and in possession of

(h) *Cole* v. *North Western Bank*, L. R. 10 C. P. 368.
(i) *Cole* v. *North Wertern Bank*, L. R. 10 C. P. 376.

goods or documents of title as aforesaid, on the faith any contract in writing to consign, deposit, transfer, deliver such goods or documents of title; and the sam are actually received by the person making the loan advance, either at the time of the contract or at a tim subsequent thereto, without notice that the agent is no authorized to make the pledge or security, such loan o advance shall be deemed a loan or advance upon th security of the goods or documents of title within this Ac

The first part of this section is quite plain, and one ma readily see the reasonableness of the construction whic decides that "entrusted with *and* in possession" mean far more than simply being allowed to have possession o the goods, though it might not strike a casual reader tha "entrusted *with* the possession" (section 2) meant as much The difficulty is in the latter part of the section, where w find the words "and the same are actually received by th person making the loan or advance, either at the time o the contract or at a subsequent time thereto." It might be thought that this strengthened the position of the plaintiff in *Portalis* v. *Tetley* (supra), but in that very case Wood, V.C., showed clearly that it could never have been intended to apply to such a case. He says, "It was not meant to apply to the case of the goods being out of the factor's possession simply by way of mortgage, and re-deemable, but to the case where the factor, being advised that the goods are coming forward to him, agrees that as soon as he gets them and as soon as the bills of lading come to hand he will pledge them. The Act seems to apply to such a case, when the owner has not at the time actually lost his control over the goods and the right of stoppage in transitu still exists."

GEO. LYNCH STAUNTON,
E. E. KITTSON.

EDITORIAL REVIEW.

New Legal Directory.

Something novel in the way of a Legal Directory has been prepared by Mr. H. R. Hardy, Barrister-at-Law, and published by Mr. C. W. Goodwin. It is in the form of a map or chart, and contains in one column the names of the Toronto firms of solicitors in alphabetical order, against each of which there is a number. To the right is a list of country solicitors grouped by cities and towns in alphabetical order, and at the left of each firm or solicitor's name the number of the Toronto agent appears.

It is the most convenient Directory of the sort that we have seen. It is intended to be hung on the office wall; and a glance at once gives the desired information.

In addition to the directory of Toronto agents, etc., it gives the names and addresses of county and judicial officers, Registrars, Division Court Clerks, etc.

The Dominion Liquor License Act.

The Supreme Court of Canada in deference, it is said (for they give no reasons), to the judgment of the Privy Council in *Hodge* v. *Reginam*, L. R. 9 App. Cas. 117, have held that the Dominion Liquor License Act and the amending Act are invalid, as being beyond the legislative jurisdiction of the Parliament of Canada, except in so far as the Acts purport to legislate respecting vessel licenses and wholesale licenses; ante, p. 66. It is understood that there will be an appeal to the Privy Council, in which case their Lordships will be called upon to distinguish between *Russell* v. *Reginam*, L. R. 7 App. Ca. 839, and Hodge's

case, which are said, but not shown, to be reconcilable Still, apart from the consequences of any appeal, the decision is not conclusive.

The exception of wholesale licenses from the judgment is an important one, and covers a much larger field than at first sight is open to the view. By section 7, sub-section (*d*), of the Act of 1883 (46 Vict. cap. 30) a "wholesale license" authorizes the licensee to sell in quantities of not less than two gallons. By this clause, then, all persons who sell in quantities of not less than two gallons are wholesale dealers, and must be licensed by the Dominion. The limit of two gallons fixed by the License Act of 1883 is a limit fixed by the Parliament itself, and appearing on the face of the Act; and there is nothing to prevent the Parliament from fixing upon any other measure or quantity, either larger or smaller than that adopted by the Act, as indicating what shall be within a wholesale license. The Parliament of Canada, acting in exercise of its jurisdiction over weights and measures has already fixed the size of a gallon; 36 Vict. cap. 47. So that the two gallons of the License Act is a quantity fixed and determinable by the law of Canada. And it is within the undoubted jurisdiction of the Parliament of Canada to enlarge or diminish the size of a gallon at will. The result is that, even if the two gallon measure were unalterably fixed as a wholesale measure, the Parliament might still empower itself by reducing the size of the gallon to license the sale of liquor in smaller quantities than it now does authorize. The probability of its doing so is not very great. But we are not dealing with probabilities. We are dealing with the limits of absolute legislative power. The limit of legislative jurisdiction, as a matter of theory, is fixed by the British North America Act. We must find it, and when found it will hem in the Parliament absolutely, and will not permit an escape from its bounds. It is clear that the power of the Parliament to regulate weights and measures gives it the ready means of escape from the consequences of the decision in question; and therefore the decision does not determine its jurisdiction at all.

But apart from that question, there must be some power in some legislative body to say what is wholesale, and what is retail dealing. The body having that power controls the regulation of the liquor traffic, on the assumption that the decision in question is correct. Some arbitrary limit must be fixed. One would naturally suppose that the Parliament of Canada, having jurisdiction to make laws respecting the regulation of trade and commerce, and weights and measures, would have power to say what should be considered a dealing by wholesale, and what a dealing by retail—especially with respect to a commodity over the wholesale dealing with which it has legislative jurisdiction. But to admit that, is practically to declare that the Parliament of Canada has jurisdiction over the whole liquor traffic, for it may fix one gill as the limit to which wholesale dealers may go. The decision in question involves the declaration that the Parliament of Canada has the right to fix this limit; for it has done so, and having done so, there is nothing to prevent its changing it.

If, on the other hand, the Provincial Legislatures have the power to determine what is, and what is not, wholesale, they could denude the Parliament of Canada of all power over the liquor traffic by fixing the limit of wholesale dealings at a quantity beyond any possible business transaction. It is not probable that they would do so, but we are dealing with the limit of absolute power, and not with probabilities. Again, if the quantities are to be fixed by the Provinces, they may be different in each Province; and in order to ascertain the meaning of a Dominion law, we should have to look at various Provincial statutes—a conclusion somewhat absurd.

It seems, therefore, that the settlement of the question, where resides legislative jurisdiction over the liquor traffic, is as far off as before.

The Osgoode L. and L. Society's Dinner.

The annual dinner of the Osgoode Literary and Legal Society will take place on the evening of 22nd April, in the convocation hall at Osgoode Hall. An effort is being

made, to which we hope a hearty response will be given, t
make this annual meeting something more nearly a re
union of the Bar than it has heretofore been. With th
assistance of the Benchers, who should be the prim
movers in such a matter, it would shortly become an esta
blished fact that, once a year at least, there should be
grand day at Osgoode Hall, to be celebrated by a dinner
So far, the Osgoode Society has provided the only occasion
for such meetings.

The members of the committee are as follows: Charle
Moss, Q.C., W. G. P. Cassels, Q.C., H. W. M. Murray, J
F. Smith, E. Douglas Armour, A. H. Fraser Lefroy, A. B
Cox, A. M. Grier, Geo. Tate Blackstock, D. T. Symons, J
A. Macintosh, C. J. Atkinson, W. B. Lawson, E. K. C
Martin, E. O'Flynn, W. E. Raney, D. Carson, A. W. Mac
dougald, and G. Eldon Kidd.

Tickets may be had of the Secretary of the Law Society.

BOOK REVIEW.

Commentaries on Equity Jurisprudence. By HON. MR. JUSTICE STORY, LL.D. Some time one of the Justices of the Supreme Court of the United States. First English Edition. By W. E. GRIGSBY, LL.D. (Lond.), B.C.L. (Oxon.), &c., &c. London: Stevens and Haynes, 1884.

While there are scores of American editions of English books, the appearance of an English edition of an American book is an unusual event. If any excuse for an English edition of Story's Equity Jurisprudence could be made, it would be the passage of the Judicature Acts; and the learned editor states in his preface that that has compelled a thorough revision of the text. It has, however, been stated by more than one eminent English judge, that the Judicature Acts were intended to make no change in equity jurisprudence or law, but rather in the administration of the law, equity being, in fact, made the law. While the passage of these Acts has occasioned many treatises on practice, it cannot be said that they have rendered necessary the production of any books on Equity Jurisprudence.

The rapidity with which case law is manufactured, however, might be of itself a sufficient reason for an attempt to reduce it to order, and a better foundation for it than the text of Story could not be found.

Such has not been quite the plan adopted by the learned editor. He has omitted both American cases and the text and notes based upon them. The text of such a writer as Story should have been preserved intact. No sufficient excuse can be made for omitting anything traced by the pen of that eminent jurist. Subsequent American notes might have been omitted in a work of the character of this one, but the text should have remained sacred.

The work done, however, has been well done. A perusal of the text does not disclose to the reader that omissions have been made from the original; and as to the notes, they are ample.

REVIEW OF EXCHANGES.

Albany Law Journal.—24th January, 1885.

May a Husband sue his Wife for Salary? by JOHN BROOKS LEAVITT. The learned writer decides, after an examination of the New York authorities, that the husband may so sue.

Ibid.—7th February, 1885.

Common Words and Phrases. Emoluments—Horse—Railway roadbed—Gunpowder—Reasonable doubt—Plying—Milk—Manual labour—Public place—are defined.

Presumption of Marriage, by GUY C. H. CORLISS. Concluded in the following number. A careful review and analysis of the reported cases upon this subject. Cohabitation and reputation are sufficient facts upon which to base a finding of marriage, save in prosecutions for bigamy, adultery and incest, and suits for criminal conversation, and certain *quasi*-criminal matters. Where the presumption has once arisen, it can only be overthrown by the most cogent proof.

Ibid.—21st February, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. RULE. An officer of the government is not compellable to give evidence or to produce documents which, in his opinion, it is for the public interest to keep secret; nor in any case while he is officially engaged in the duties of his office.

Ibid.—7th March, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. RULE. Communications made for the purpose of detecting or punishing crime are privileged, and neither the name of the informer nor the nature of his communication can a witness, who has received such communication, be compelled to disclose, whether the witness be an officer of the government or the law, or a private person.

Ibid.—14th March, 1885.

Common Words and Phrases. Household effects—Supplying heat—Body of water—Express business—Book—Approach to a bridge—Water-course, are considered.

The Household Agency of Wife for Husband, by DAVID STEWART. If husband and wife are permanently separated, and the wife has a separate establishment of her own, even if it has been given her by him

it is hers, and there is no presumption that she may keep it at his expense. If they are only temporarily separated through his absence and she is apparently in charge of his establishment, there is a very strong presumption that she is his agent in the management thereof. If they are living together, but are boarding or have no establishment, the fact of their cohabitation raises no presumption whatever of any agency of her for him. If they are living together and are keeping house, there is a presumption that she has charge of the domestic part thereof. In general, the ordinary rules of agency appear to apply. Numerous cases are cited.

Ibid.—*21st March*, 1885.

Jurisdiction of Courts of Equity over Wills, by AUGUSTUS A. LEVEY. The history and extent of the jurisdiction are very fully treated of, and references are given to a large number of cases. An instructive and well written article.

Ibid.—*28th March*, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. A continuation of the learned writer's former contributions upon this subject. RULE. No witness is compellable against his objection to answer questions, or to produce documents or other evidence which may have a tendency to render him amenable to indictment for a crime, or prosecution for a felony.

Jury Reform, by HENRY T. TERRY. "It is sometimes asked, is it not reasonable to suppose that men of special training, experts who spend their lives deciding cases, will always be a better tribunal than men taken from the community at large? But the common sense of the community answers, no, not always; though perhaps usually. And the cases in which it will not will be likely to be those that touch the popular heart. But even if a trial by judges would always be more likely to result right, still it would not be possible to make the people believe so. Courts entirely in the hands of lawyers would be looked upon with a little distrust; and it is nearly as important that people generally should trust the courts as that they should be in fact trustworthy." The weak points of jury trial are the required unanimity of verdict, and the jury's power to render a general verdict. This latter power should be limited to a simple finding of specific facts. Other reforms suggested are, limiting the number of the jury to five, or even three, with power to the court to increase it; and the establishment of the right of any party or the court to present to the jury in writing questions material to the case, which the jury should be compelled to answer in their finding, the court to declare the conclusion of law from the facts found.

Ibid.—*4th April*, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. RULE. A witness may be compelled to give evidence, although it may degrade or disgrace him, subject to the former rule as to fines and penalties.

Irish Law Times.—19*th July*, 1884.

Retiring Partner Soliciting Customers of Old Firm. *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, was disapproved, and overruled in *Pearson* v *Pearson*, L. R. 27 Chy. Div. 147. A short commentary upon these cases

Ibid.—26*th July*, 1884.

Acknowledgments of Debts Barred by Statute of Limitations. The vacillation of early decisions is pointed out. *Green* v *Humphries*, 53 L. J. Ch. 625, is then criticised. "First of all, as Bowen L.J., put it, the acknowledgment must be clear in order to raise the implication of a promise to pay; and an acknowledgment which is so qualified as not to raise that inference will not come within the definition. Secondly, supposing there is an acknowledgment clear enough of a debt still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition."

Ibid.—2*nd August*, 1884.

Misrepresentation as to Power to Accept Bills of Exchange. "It is not enough in such cases to show that there was a misrepresentation; it should be as to a matter of fact." A misrepresentation as to law is not sufficient, for one man is bound to know the law as well as another. But the misrepresentation as to power to accept bills may be a misrepresentation of facts. For a power may exist under a private Act of Parliament, and the representation of power to accept might be the representation of the existence, or implied existence, of such an Act.

Ibid.—9*th August*, 1884.

Promise of Marriage as Consideration for Contract. An English and an American case are cited, in the former of which a contract in consideration of an intended marriage which never took place was held to have been put an end to; in the latter the fair one sued the administrator of her deceased lover who died instead of marrying her. The learned Judge who tried the case held, amongst other things, that a man should not take advantage of his own wrong, and declared the plaintiff entitled to bonds agreed to be conveyed to her by the contract.

Ibid.—16*th August*, 1884.

Right of Former Servant to Describe Himself as formerly in Master's Service. A Scotch case is noted, in which a servant was restrained.

Ibid—23*rd August*, 1884.

Secret Trusts for Objects not Communicated to Trustee till after Testator's Death. *Boyes* v. *Carritt*, 53 L. J. Ch. 654, is discussed. A testator bequeathed all his property to the defendant whom he appointed sole executor. After his death two memoranda were found unattested, addressed to the defendant, declaring that the testator desired

him to hold all the property except £25 for N. B. The defendant admitted that he was only a trustee. The Court held that the trust for N. B. could not be executed, but held the next of kin beneficially entitled.

Ibid.—*4th October*, 1884.

Convictions on Joint Indictments for Conspiracy. On an indictment for conspiracy, if all the defendants except one are acquitted, and it is not stated to be a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him. The earliest as well as most recent cases are shown to support this proposition.

Ibid.—*11th October*, 1884.

Administration Granted on Concealment of a Will. In *Abram* v. *Cunningham*, 2 Lev. 182, it was held that, when administration was granted on concealment of a will, the grant was void from its commencement, and all acts performed by the administrator were void *ab initio*. But this is so only where the concealed will has appointed executors, and the right of property has therefore vested in them before probate or the granting of the letters of administration. In other cases revocation of the letters will not affect acts done by the administrator before revocation.

Ibid.—*18th October*, 1884.

Legacies, Specific or Demonstrative. The distinction between such legacies is pointed out, and a recent case *In re Sayer*, October number of the L. J. Reports, commented upon.

Ibid.—*25th October*, 1884.

The Legal Position of the Salvation Army. Concluded in the two following numbers. The remedies, which have been sought in the Courts by indictment, injunction, etc., to suppress what is considered by many the public nuisance occasioned by the noisy, and sometimes disorderly, processions and gatherings of this body, are considered. The cases appear conflicting, and the views entertained by the Judges very diverse. An Australian case is abstracted, as well as a Canadian case. "It only lies on the Canadian salvationist to *play* his drum without *beating* it—which feat being achieved, he may defy the ordinance in question with a goodly show of reason, as the proscription 'no smoking allowed' was said to be not infringed by the fumigator who was not 'smoking aloud.'"

Ibid.—*22nd November*, 1884.

Evidence in Actions for Goods sold to Infants. Concluded in the following number. What are and what are not necessaries, is discussed. Will an article otherwise a necessary become no longer such from the fact that the infant is already sufficiently supplied in this particular? And is it material that the tradesman supplying such had

no knowledge, or made no attempt to acquire knowledge, whether t infant was or was not already so supplied? English, and one or tv American, decisions are referred to.

Ibid.—6*th December*, 1884

Form of Solicitor's Bill of Costs. While no particular headi to a solicitor's bill is requisite, the bill must be delivered in a taxab shape, and otherwise no action can be brought upon it. In *Wilkinson Smart*, 33 L. T. N. S. 573, the bill contained a number of items with fixed charges opposite them, but at the end there was put down a lun sum as the agreed amount of costs for all those items; and it was he that this was not a sufficient bill within the statute, and that the client entitled to demand a full bill, where action is brought, even though a agreed sum is charged. Where a lump sum is charged which th Master cannot possibly tax, owing to the absence of the specific items, will be struck out of the bill, but if a reasonable number of other item remain, properly charged, the bill may be held sufficiently delivered as t them, so as to support the action.

Ibid.—13*th December*, 1884.

Injunctions to restrain Defamation. Since the Judicature Act (although before doubted and denied) the Courts in England, hav jurisdiction to restrain the publication of libellous matter calculated t injuriously affect a man's business or property. The jurisdiction appear also to extend to slanderous statements made with reference to propert or trade, and, it is suggested, even defamation reflecting on individua reputation only. The American Courts generally disclaim such juris diction.

Ibid.—24*th January*, 1885.

Interdicts against Dealing with Particular Traders. The deci sion in an American case, holding that mere "boycotting" is not, in th absence of statutory enactment, unlawful, is abstracted at length, and commented upon.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [18TH DECEMBER, 1884.

HAMILTON PROVINCIAL LOAN CO., v. CAMPBELL.

Interpleader—Ejectment—Right to growing crops seized before judgment in ejectment.

The judgment of the Court below, 5 Ont. R. 371; 4 C. L. T. 190, was affirmed.

Muir, for the appellants.

G. H. Watson, for the respondent.

BOYD, C.]

PARKE. v. ST. GEORGE.

Chattel mortgage—Consideration expressed—Future advances—Assignment for creditors—R. S. O. cap. 119—Simple contract creditor—Fraudulent assignment.

Q. and A., carrying on business as licensed victuallers, were indebted to the defendant S., a wine merchant, to the amount of $1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make

upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly, on the 24th January, 1882, executed a mortgage to S. on all their stock-in-trade, securing $2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business; and he did in fact, between the date of the execution of the mortgage and the 3rd of March following, advance to them $300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period.

The affidavit of indebtedness in the sum of $2,400 was in the usual form, and the mortgage was duly registered.

On the last mentioned date, Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this agreement as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee, and sold the same, undertaking to hold the proceeds subject to the order of the Court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for $101.94 and interest; and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee.

Held, that, although the fact of the mortgage expressing on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as rendered the security void under R. S. O. cap. 119, as against creditors, yet it being clearly shown that everything between the parties in connection therewith was done *bonâ fide*, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the Court (Patterson, J.A., dissenting), reversed the judgment of the Court below; 2 Ont. R. 342; 3 C. L. T. 35.

Per Patterson, J.A. The mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the Statute, being untrue in fact, rendered the security void.

Per Burton, J.A. Although no ground was shown for impeaching the transaction as a fraudulent preference, the mortgage, under the Chattel Mortgage Act, R. S. O. cap. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having taken possession of the property, the plaintiff could not maintain the action.

Per Osler, J.A. The agreement between the mortgagors and the mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary therefore that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. cap. 119.

Moss, Q.C., for the appellant.

Cassels, Q.C., for the respondents.

MAGURN v. MAGURN.

Alimony—Canadian subject—Foreign marriage and divorce—Domicil.

In an action for alimony the defendant relied upon a divorce granted on his petition by a Court in Missouri, where he then resided, the wife (the present plaintiff), having made no defence thereto, though notified of the proceedings. It appeared that the domicil of the husband at the time of the marriage and of the divorce was Canada, though the marriage was celebrated at Detroit; and the wife was an American citizen. It was proved that the evidence of desertion as alleged by the husband, by the wife, and on which the decree for divorce was founded, was untrue.

Held, that the decree having been obtained on an untrue statement of facts and for a cause not recognised by our law, could not be set up as a bar to the wife's claim for alimony,

Held also, that the wife's failure to appear or defend the action for divorce, did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that action.

Held also, affirming the decision of the Court below; 3 C. L. T. 352, that the jurisdiction to divorce depends upon the domicil of the parties, *i. e.*, of the husband, and that thus being Canadian, the Missouri Court had no jurisdiction.

Per Hagarty, C. J. O.—There is no safe ground for distinction between domicil for succession, and for matrimonial purposes; or a domicil for residence.

[13TH JANUARY, 1885.

VANKOUGHNET v. DENISON.

Sale of land—Restrictive covenant—Ambiguous description—Parol evidence—Maps not referred to in deed—Admissibility of.

D. sold to the predecessor in title of the plaintiff certain lands, and the deed contained the following (which was held to amount to a covenant, the benefit of which passed to the plaintiff):—"Bellevue square is private property, but it is always to remain unbuilt upon except one residence with the necessary outbuildings including porter's lodge." The land having been sold under mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes.

Held, that parol evidence was admissible to show what was meant by "Bellevue square," no plan or description being incorporated in the deed.

Held, also, that the defendant's liability under the restrictive agreement not to build on Bellevue square, revived on his again acquiring the property.

Certain maps of the city of Toronto, made by city surveyors in 1857 and 1858, showing thereon a square marked "Bellevue square," were offered in evidence to show the boundaries of the square. It was shown that the defendant knew of these maps, but they were not prepared under his instructions.

Held, that the maps could not be received in evidence to show the boundaries of the square.

Per Hagarty, C.J.O. The maps were admissible to show that there was such a square known as Bellevue square, but not as evidence of title or boundary.

Per Burton, Patterson and Osler, JJ. A. The maps were not admissible in evidence without its being shown that they had been prepared under the instructions of the defendant or on information given by him.

The parol evidence showing that but a portion of the land claimed by the plaintiff to be the square was undoubtedly within the limits of the square, the appeal was allowed as to all but that portion.

S. H. Blake, *Q.C.*, and *Black*, for the appellants.

Maclennan, *Q.C.*, for the respondent.

PROUDFOOT, J]

YORK v. TORONTO GRAVEL ROAD CO.

Agreement, construction of—"Traction engine."

The Court being equally divided, the appeal was dismissed, and the judgment of the Court below, 3 Ont. R. 584, was affirmed.

Per Burton, J.A., and Rose, J. The appeal should be allowed; but as the Legislature had interfered by 44 Vict. cap. 57 (O.), there should be a reference back under that Act to assess the compensation.

Robinson, *Q.C.*, and *Osler*, *Q.C.*, for the appellants.

J. K. Kerr, *Q.C.*, and *Cassels*, *Q.C.*, for the respondents.

HOGG v. MAGUIRE.

Will, validity of — Establishing prior will — Uncorroborated evidence of beneficiary.

E. B. made a will whereby he gave the bulk of his property to the plaintiff his sister. The defendant, another sister, claimed under a second will made an hour or two before the testator's death. The evidence showed that the testator was a very determined man, and not easily influenced; that he was suffering from excessive indulgence in drink; that he latterly spoke in very bitter and offensive terms of the

defendant, and had frequently said that she should have nothing; that he had frequently, and as late as a few days before his death, stated that if he died everything was arranged and that the plaintiff would get his property. Shortly before his death the defendant had him brought to her house. On the night of his death the physician in attendance told defendant that if anything was to be settled it should be done at once. A solicitor was sent for to draw a will. The defendant instructed him before he saw the testator. When the will was drawn, which gave the bulk of the property to the defendant, but contained a bequest of $1,000 to the plaintiff, the solicitor read it over to the testator and asked him if he approved of it. He made a sign of dissent. The defendant tried to persuade the testator to give the plaintiff the $1,000, but (as the defendant stated) he said $10 was enough for the plaintiff. In its altered form the will was signed. The evidence of various witnesses for the defence was conflicting as to the incidents which happened during this time and until the testator's decease; but, while they all spoke of the testator's unwillingness to give the plaintiff more than $10, there was no evidence, other than that of the defendant, of his desire to give the defendant the bulk of his property or to make any disposition of his property.

Held, reversing the judgment of the Court below, that the second will could not be established on the uncorroborated evidence of the defendant, and the first will was declared to be the testator's last will.

Robinson, Q.C., for the appellant.

S. H. Blake, Q.C., *Lash, Q.C.*, and *Francis*, for respondents.

ARMOUR, J.] [26TH JANUARY, 1885.

TOWNSHIP OF ROMNEY v. TOWNSHIP OF MERSEA.

Drainage by-law—Petition for by-law—Description of property to be benefitted—Majority of owners.

A petition of ten owners of lots in the 8th and 9th concessions of Mersea prayed that a by-law might be passed for the construction of a drain, and that a rate should be levied "on said lots and parts of lots and roads benefitted"; but no description of the lands to be benefitted was given. The engineer's report was made, and a by-law was passed which professed to show the property to be benefitted, and assessed about one hundred and fifty properties in Romney and Mersea for the work.

Held, reversing the judgment of the Court below, that the petition would not support the by-law, which was therefore quashed.

C. R. Atkinson, for the appellants.

Robinson, Q.C., for the respondents.

C. C, WENTWORTH.] [13TH JANUARY, 1885.

PROCTOR v. McKENZIE.

Ca. Sa. returnable after execution—Premature return—Liability of bail.

Bail are not obliged to render their principal before the return day of a *ca. sa.*

Therefore, where a writ of *ca. sa.*, which would remain in force for two months, and was not returnable on a day certain, but immediately after execution, lay in the sheriff's hands from the 16th July (the day of the teste) till the 21st July, when it was returned *non est inventus*,

Held, Hagarty, C.J.O., dissenting, reversing the judgment of the Court below, that the bail were not fixed.

Held, also that the objection was not a matter of practice only which should have been taken advantage of by motion, but was a matter of law, to be taken advantage of by plea.

Mackelcan, Q.C., for the appellant.

W. F. Walker, for the respondent.

IN CHAMBERS.

[PATTERSON, J.A., 19TH JANUARY, 1885.

CAMERON v. BICKFORD.

Appeal to Privy Council—Security—Sureties on prior bonds—Sufficiency of.

The judgment of the Court of Chancery in favour of the defendant was reversed on appeal to the Court of Appeal, 4 C. L. T. 537. The defendant appealed to the Judicial Committee of the Privy Council. He gave security for the costs of that appeal, and for the plaintiff's costs of the appeal to the Court of Appeal, the sureties in each case being the same. He subsequently gave security for the plaintiff's costs of the Court of Chancery, offering the same sureties a third time. It appeared on cross-examination of the sureties that they were sufficient for the amount secured by any one of the bonds, but that they were not sufficient for the amount secured by the three bonds.

Held, that the security was not sufficient, and an application to stay execution was refused unless further security should be given.

P. McPhillips, for the plaintiff.

R. C. Dickson *(Blake, Kerr, Lash & Cassels)*, for the defendant.

(Reported by Hamilton Cassels, Esquire, Barrister-at-Law.)

High Court of Justice.

COMMON PLEAS DIVISION.

[ROSE, J., FEBRUARY, 1885.

HAMILTON ROAD CO. v. BINCKLEY.

Road Company—Power to exempt from payment of tolls—Ultra vires—Lapse of time.

By agreement made in the year 1869 between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins Canal to within the limits of the City, and, as part of such road, were to build a bridge over the canal, the city to lend the road company $5,000 for ten years, at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no tolls should be exacted from any parties residing in or owning property within the limits of the city, on passing over the said bridge. In that year, litigation arose between the road company and the city, the Great Western Railway Company and the Desjardins Canal Company as to the erection of the bridge, which litigation continued until 1874, when a settlement was effected by its being agreed by all parties interested that a fixed stationary bridge should be erected and maintained by the road company free from any tolls thereon, which was legalized by the Act 37 Vict. cap. 73 (O). The defendant objected that the proviso in the by-law as to not exacting tolls from residents of Hamilton was unlawful, being unreasonable and unjust, and discriminating in favour of a class; and that the by-law was bad for uncertainty, the location of the road not having been fixed prior to the passing of the by-law.

Held, that the company could agree not to charge tolls to any person or body of persons, unless there was something in the Act of incorporation (which was not the case here) which prevented their doing so; that the City of Hamilton had paid a substantial sum for the privilege; and there was no discrimination as regards the residents thereof; that the proviso only applied as to not exacting tolls on the bridge, and had nothing to do with the road, and was legalized by 37 Vict. cap. 73 (O).

Held, also, that the objection as to the location was not tenable after the road had been located and in use for fifteen years.

Lash, *Q.C.*, for the plaintiffs.

Sadlier, for the defendant.

[11TH MARCH, 1885,

BEASLEY v. CORPORATION OF HAMILTON.

Accident—Negligence of Municipal Corporation—Statement of defence—Sufficiency of—Notice.

Statement of claim for damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole on the sidewalk, which was alleged to be defective, loose and out of repair through the defendants' default and negligence. By the first paragraph of the statement of defence the defendant denied the correctness of the statements contained in the plaintiff's statement of claim; and by the second paragraph set up that the defendants had no notice or knowledge that the covering or lid was defective, loose, or out of repair.

Held, on demurrer to the second paragraph of the statement of defence, that the whole statement of defence must be read together, and that the second paragraph, taken with the first, either constituted a good defence or was immaterial; that it certainly could not embarras the plaintiff, for if he proved actionable negligence, he must prove either actual or presumptive notice.

The demurrer was therefore overruled.

MacKelcan, Q. C., for the plaintiff.

A. D. Cameron for the defendant.

[14TH MARCH, 1885.

Re BORTHWICK & THE CORPORATION OF OTTAWA.

Municipal By-Law—Construction of—Markets.

Sec. 1 of Art. IX. of a by-law passed by the corporation of the city of Ottawa provided that no person should sell any fresh fish elsewhere than in such places as shall be allotted and designated by the Standing Committee on Markets in any of the aforesaid markets. Sec. 1 of Art X. provided that the vendors of any articles in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully without paying market fees offer for sale any such articles at any place within the city excepting the market places thereof. Sec. 1 of Art. IV. provided that all produce, provisions, or articles of any kind brought to any of the meat, fish and produce markets and exposed for sale should be placed in boxes and exposed in carts or other vehicles, which should be placed upon said markets under the direction of the market inspector; any person refusing to comply therewith or to remove such articles, vehicles, or boxes, after selling their contents, should be subject to the penalty imposed by the by-law and liable to expulsion from the market. It appeared that the by-law was a consolidation of previously existing by-laws passed

from time to time; and that many years ago certain stalls in each market were set apart as fish markets; and that no application was ever made for standing room for carts or other vehicles from which to sell fish, and no provision made by the council for so bringing fresh fish to the market.

Held, that sec. 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it; and that, reading sec. 1 of Art. IX, and sec. 1 of Art. X. together, they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in markets; but outside of the market no restrictions should be placed on the selling.

A motion to quash a conviction was therefore refused.

Shepley, for the motion.

Maclennan, Q. C., contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST MARCH, 1885.

RATTE v. BOOTH.

Parties—Joinder of.

The plaintiff, the owner of a water lot abutting on the Ottawa River, who carried on the business of letting boats for hire, brought an action against four saw mill owners, alleging that the defendants, being each the owner of a saw mill situated higher up the river than the plaintiff's lot, had each been in the habit of throwing sawdust and slabs into the river and that this waste matter floating down the river had lodged upon and in front of the plaintiff's water lot, and had there formed into a solid mass.

Held, that all four defendants were properly joined in one action.

McCarthy, Q. C., *Gormully*, and *W. H. P. Clement*, for the defendants.

Maclennan, Q. C., for the plaintiff.

LAUDER v. CARRIER.

Dower—Pleading—Rule 128.

The statement of claim in an action of dower alleged that the plaintiff was the widow of L., who died seised of such an estate (in certain lands) as to entitle the plaintiff to and give her an estate of dower therein.

Held, that the pleadings in actions of dower are to be governed by the provisions of the Judicature Act. The right to dower is a legal conclusion from certain facts, and these facts ought to be shortly stated in the pleading; and therefore that the statement of claim was insufficient. Leave given to amend.

S. H. Blake, Q.C., and *Grote*, for the plaintiff.

Langton and *Haverson*, for the defendants.

[BOYD, C., 15TH DECEMBER, 1884.

In Re HUNT, *a Lunatic.*

Lunatic—Committee—Security—Receiver.

H. and C. were appointed committee of the estate of a lunatic, to act upon satisfactory security being given. The estate of the lunatic being large, security could not be furnished. The lunatic was a man well advanced in years, and before becoming of unsound mind he had made his will whereby he appointed H. and C. his executors, and devised and bequeathed his property in equal shares to his children. The children now applied for an order appointing H. and C. committee of the estate without security.

Held, that the appointment of a committee without security cannot be made, the Chancery Act forbidding it.

The appointment of H. and C. as committee of the estate was vacated, and they were appointed receivers of the personal estate, and of the rents and profits of the real estate, of the lunatic, their personal bond, without sureties, being accepted as security.

R. S. Cassels, for the motion.

(Reported by Hamilton Cassels, Esq., Barrister-at-Law.)

[FERGUSON, J., 21ST MARCH, 1885.

KINCAID v. REED.

Judgment creditor—Receiver of debtor's estate.

G. H. Watson, for the plaintiff, moved for an order appointing the plaintiff receiver of the share of the defendant (against whom judgment had been recovered in this action,) to which he was entitled in the estate of his deceased father in the hands of the administrator. He cited *Fuggle* v. *Bland*, L. R. 11 Q. B. D. 711; *Webb* v. *Stenton*, L. R. 11 Q. B. D. 518; *Westhead* v. *Riley*, L. R. 25 Chy. Div. 413.

FERGUSON, J., made the order asked for, appointing the plaintiff receiver of the defendant's share to the extent of the judgment and costs, including the costs of the application. The plaintiff not to be required to give security, and not to receive any remuneration. The plaintiff to pass his accounts as receiver and to hold the money subject to further order.

IN CHAMBERS.

[BOYD, C., 5TH DECEMBER, 1884.

GARDINER v. COVERDALE.

Partition—G. O. 640—Special directions.

Held, that, on application for a partition order under G. O. 640, no special directions as to taking accounts of sums alleged to have been advanced by the intestate to one of the heirs-at-law can be given. An action should be brought in such a case.

R. S. Cassels, for the motion.

John Hoskin, Q. C., and *Geo. M. Evans*, contra.

(Reported by Hamilton Cassels, Esquire, Barrister-at-Law.)

[19TH JANUARY, 1885.

THOMPSON v. FAIRBAIRN.

Administration suit—Reference, change of—Conduct of reference.

An appeal from the order of the Master in Chambers, changing the place of reference in an administration matter from Brantford to Walkerton, and giving the conduct of the reference to the defendants the executors, instead of the plaintiffs, was dismissed with costs.

Held, that the reference in administration matters should *prima facie* be to the place where the person whose estate is to be administered resided in his lifetime. G. O. 638 supersedes the practice as laid down in *Macara v. Gwyn*, 3 Gr. 310.

During the argument before the Master, and on the appeal, the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs.

Held, that the solicitor could not obtain the conduct of the reference unless by a substantive application; but the appeal was dismissed without prejudice to a substantive application.

W. H. C. Kerr, for the plaintiffs.

Hoyles, *George Kerr*, *Jr.* and *Holman*, for various defendants.

[4TH MARCH, 1885.

WHITE v. BEEMER.

Reference under Sec. 48, O. J. A.—Jurisdiction of Master in Chambers and Local Judges.

A county judge sitting as local master under Rule 422, made an order, purporting to be under the Judicature Act, sec. 48, referring all the matters in difference in the action for trial to an official referee.

Held, on appeal, that as the Master in Chambers has not the power to deal with matters of reference under the C. L. P. Act, he (or a Local Judge sitting as Master under Rule 422) should not *a fortiori* make orders under the Judicature Act, sec. 48; for by that means the findings of the referee become equivalent to the verdict of a jury and perhaps can only be moved against before the Divisional Court.

Edmonson, for the appeal.

Geo. Tate Blackstock, contra.

[ROSE, J., 12TH JANUARY, 1885.

BRICE v. MUNRO.

Demurrer—Setting aside as frivolous.

Held, on appeal from the Master in Chambers, who set aside a demurrer as frivolous, that the jurisdiction as to setting aside demurrers as frivolous should rarely be exercised where the point is a new one and is apparently raised in good faith to obtain the opinion of the court.

Where it is evident that the party demurring is raising a question manifestly insupportable, not admitting of argument, and is in fact trifling with the Court, either through gross ignorance or desire for delay, it may be convenient to at once set aside the demurrer.

The demurrer raised the question whether, in an action against a shareholder living in Ontario in a joint stock company incorporated under a Dominion Act, it is sufficient to shew that judgment had been obtained against the Company and execution issued and returned unsatisfied in whole or in part in another Province, or whether it is necessary to shew that execution has been returned unsatisfied in whole or in part in Ontario.

Held, that the demurrer was not frivolous.

Lash, Q.C., for the appeal.

Shepley, contra.

[11TH FEBRUARY, 1885.

MOXLEY v. CANADA ATLANTIC RAILWAY CO.

Affidavit on production—Material for motion for better affidavit.

The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant for inspection at the offices of the Company"; and a further statement that the Company had "sealed up such parts of the said books as do not relate to the matters in question in this action." The plaintiffs went to trial, and called as witnesses the train dispatcher, locomotive engineer, and an engine driver of the defendants. The Judge at the trial refused on the evidence there given to direct the books to be unsealed. The trial was then adjourned, and the plaintiff applied to the Master in Chambers for an order for a further and better affidavit of documents from the defendants, reading on the application the evidence taken at the trial, and asking to have the sealed up portions of the books unsealed for inspection. The Master made the order asked, and the defendants appealed.

Held, that the evidence taken at the trial was not proper material upon which to make an order for a better affidavit of documents.

Held, also, that as such evidence did not satisfy the Judge at the trial that he should have directed the books to be unsealed, a Master or Judge in Chambers should not be called upon to pass an opinion on the same evidence to accomplish what the plaintiff at the trial failed to do.

Held, also, that even if the evidence could be looked at, it would be impossible to say that the affidavit on production was untrue.

Jones v. *Monte Video Gas Company*, L. R. 5 Q. B. D. 556, considered.

[16TH FEBRUARY, 1885.

LYON v. McKAY.

Affidavit on production, sufficiency of—Documents lodged in Court—Affidavit to show insufficiency of affidavit on production.

The plaintiff in his affidavit of documents mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated that "such documents were filed in this Court on the motion made by defendant for his discharge from custody." The defendant contended that the plaintiff should have scheduled these letters.

Held, that the plaintiff's affidavit was sufficient, and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the Court at his own place of abode.

Held, that an affidavit to show the incorrectness of the affidavit of documents could not be received, following *Jones* v. *Monte Video Gas Company*, L. R. 5 Q. B. D. 556.

Hoyles, for the appeal.

W. H. P. Clement, contra.

[3rd March, 1885.

ONTARIO BANK v. BURK.

Judgment under Rule 80—Promissory note—Notice of dishonour—Address of endorser.

An action on a promissory note for $15,000, dated at Prince Arthur's Landing, 18th September, 1884, payable one month after date at the Ontario Bank there, made by the defendant Marvin Burk, payable to the order of the defendant C. C. Burk, and endorsed by C. C. Burk, and the defendant D. F. Burk. The defendant C. C. Burk resided at Bowmanville, and the other defendants at Prince Arthur's Landing. Since the making of the note the place called Prince Arthur's Landing had been incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. Prince Arthur's Landing was not an incorporated place, and the post office, prior to the incorporation, was called Thunder Bay. A motion was made by the plaintiffs before the Master in Chambers for judgment under Rule 80, against the defendants C. C. Burk and D. F. Burk, as endorsers of the promissory note. The sole defence suggested in answer to the application was want of notice of protest, the defendants C. C. Burk and D. F. Burk being, as it was said, accommodation endorsers. These defendants filed affidavits denying receipt of any notice of dishonour. In the material filed by the plaintiffs on the application, there was no allegation of notice of protest, save that the plaintiffs claimed notarial charges. The protest was, however, subsequently produced in chambers.

The Master in Chambers having expressed an opinion against the defendants on their affidavits, the defendant C. C. Burk obtained an enlargement to examine the notary and his clerk. On the return of the enlarged motion the depositions taken on the examination were produced, and it was shewn by them that notice had been sent to the defendant C. C. Burk at Port Arthur, and on this a further point was raised, viz., that the Stat. 37 Vict. cap. 47, sec. 1 (D) had not been complied with, the notice of protest not having been addressed either to the defendants' place of residence, or to the place where the note was dated. The Master in Chambers made the order asked, directing judgment under Rule 80, and the defendants C. C. Burk and D. F. Burk appealed.

Held, that, as the protest was not originally part of the plaintiffs' material, therefore, apart from the examination of the notary and his clerk there was no evidence of the defendants having received notice, and

as there was a distinct denial by the defendants of having received notice, the motion should have been refused before the enlargement took place.

Held, also, that the fact of notice was one which the plaintiff should have proved, and the production of the protest being only presumptive evidence of the posting of the notices was not sufficient in the face of the denial of receipt of the notices.

Held, also, that the point raised on the depositions of the notary and his clerk, as to the sufficiency of a notice addressed to Port Arthur, when the endorser resided at Bowmanville, and the note was dated at Prince Arthur's Landing, was one open to argument upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered.

Walter Barwick, for the plaintiffs.

Holman for the defendant C. C. Burk.

Macrae, (*R. S. Smellie*) for the defendant, D. F. Burk.

McCRANEY v. McLEOD: HAWKINS, *Garnishee.*

Attachment of debts—Money due under contract.

McCraney & Son having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th March, 1884. The debt alleged to be due from Hawkins to McLeod was for work done by McLeod upon a building contract for Hawkins. The contract was that McLeod was to erect a house for which he was to receive from Hawkins $1,225, $300 when the frame was up, $300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd February, 1884. McLeod went on with the work and received the two sums of $300, but he had not completed the building on the 3rd February, 1884. He, however, continued the work till after that time, and till after the 1st of April, when, the building being still unfinished, Hawkins entered, took possession, and completed it.

Held, that the debtor having abandoned the contract, and his employee not having entered upon the work at the time of the service of the attaching order, no debt then existed according to the term of the contract, and no promise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate.

McClive, for McCraney & Son.

A. J. Hill and *Echlin*, for opposing creditors of McLeod.

Eddis, for the Garnishee.

[4TH MARCH, 1885.

BUDWORTH v. BELL.

Common informer—Penal action—Security for costs—Time for applying—C. L. P. Act, sec. 71—Rule 429.

In a penal action brought by a common informer the Master in Chambers made an order in general terms for security for costs under the 71st section of the C. L. P. Act. The order was made after the statement of defence had been delivered and after the parties had been examined for discovery in the action.

Held, on appeal, following *Sydney* v. *Bird*, L. R. 23 Chy. Div. 358, that the order was properly made at that stage of the cause, and was authorized by Rule 429, but that the order should be amended so as to direct that security should be given for the costs to be incurred in such suit or action following the words of the 71st section of the C. L. P. Act.

H. T. Beck, for the plaintiff.

13TH MARCH, 1885.

GORING v. THE LONDON MUTUAL FIRE INSURANCE CO.

Examination for discovery—Officer of corporation.

In an action upon a fire insurance policy against a company,

Held, that the local territorial agent of the company, who received the application and the premium, and issued the interim receipt, and his successor who had charge of the agency when the fire occurred, were subject to examination for discovery before the trial, as officers of the company under the C. L. P. Act.

Quære, whether the examination should not be limited to the purposes of discovery, and whether or not it should be used in evidence against the company.

W. H. P. Clement, for the plaintiff.

Aylesworth, for the defendants.

HUGHSON v. GORDON.

Judgment under Rule 80.

In an action on a promissory note made by the defendant in favour of one McKenzie, and by him endorsed to the plaintiffs, the Master in Chambers made an order for judgment under Rule 80. The usual affidavit was made by the plaintiffs' manager. The defendant filed an

affidavit in answer, showing that he was an accommodation maker, and stating, on his information and belief, that the plaintiffs were well aware of the fact. He also stated, on information and belief, that the plaintiffs held the note as collateral security, and that they never gave any value for it, and further that since the making of the note McKenzie had become insolvent, and had made an assignment for the benefit of his creditors, and that there was litigation pending between the plaintiffs and his assignee in respect of certain securities alleged to be held by the plaintiffs on account of McKenzie's indebtedness. An affidavit of the plaintiff's manager in reply was filed, denying knowledge of the note being an accommodation note, and stating that it was discounted by the plaintiffs and the proceeds placed to McKenzie's credit.

Held, on appeal, that it is not the duty of the Judge in Chambers, hearing an application under Rule 80, to determine how the facts are; and that this was not a case in which judgment should have been ordered.

Aylesworth, for the appeal.

J. H. Mayne Campbell, contra.

RYAN v. CANADA SOUTHERN RAILWAY CO.

Local Judge—Jurisdiction to rescind orders.

The plaintiff's solicitors lived at Sandwich, and the defendants' solicitors at Toronto. The Local Judge at Sandwich, in November, 1884, made an *ex parte* order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendants' application, on notice to the plaintiff, and after argument by counsel on behalf of both parties. The plaintiff appealed from the second order to a Judge in Chambers at Toronto.

Held, that the Local Judge had no power under Rule 422 to rescind his order. Subsequently the defendants made a substantive motion before the same Judge in Chambers at Toronto to set aside the original order of the Local Judge.

Held, that, save as excepted, a Local Judge of the High Court, in proceedings in the High Court, having the same power in Chambers as a Judge of the High Court in Chambers, as to the matters referred to in the Rules, is a Judge of co-ordinate jurisdiction with a Judge of the High Court in Chambers. A Judge of the High Court in Chambers has therefore no power to review the decision of a Local Judge, save by way of appeal in the manner provided by the Judicature Rules.

Aylesworth, for the plaintiff.

H. Symons, for the defendants.

[16TH MARCH, 1885.

CULVERWELL v. BIRNEY.

Examination of defendant for discovery—Excluding co-defendant.

Held, that a Special Examiner was right (on application therefor made to him) in ruling that the defendant, Joseph Birney, should be excluded during the examination before him in the cause of his co-defendant, J. L. Birney.

An appeal from the order of the Master in Chambers, directing the defendant J. L. Birney to attend and be examined at his own expense, after an examination which proved abortive on account of the refusal of Joseph Birney to obey the Special Examiner's ruling, and directing the defendants to pay the costs, was therefore dismissed.

Fullerton, for the appeal.

Holman, contra.

SLATER v. PURVIS.

Changing place of trial.

The action was on a promissory note made at Toronto and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was that the defendant was discharged from liability by a discharge under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the county court at Toronto, and the assignee of the defendant who also lived in Toronto. The plaintiff filed no affidavit on the motion.

A motion by the defendant to change the place of trial in the action, which was brought in the County Court of Middlesex, from London to Toronto, was refused.

Morson, for the motion.

Aylesworth, contra.

FLETCHER v. FIELD.

Solicitor and Client—Costs—Taxation—Special circumstances.

An appeal from the order of the Master in Chambers directing taxation of the plaintiffs' bill of costs sued on in this action nearly two years after delivery was allowed. The bill was for professional services rendered to the defendant in an investigation of his conduct as a public official before a commission appointed by the Government of Ontario, the plaintiff acting

as defendant's solicitors, and also assisting as counsel in the investigation, a senior counsel being also in attendance. The amount of the bill was $593.42, the chief items being counsel fees. The solicitors who were acting against the defendant in the investigation charged their clients $740. The investigation lasted nine days. The bill was rendered in 1883. The special circumstance relied upon to enable the defendant to obtain the order for taxation, after the lapse of more than a year from the delivery of the bill, was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs, that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay said bill of costs, I being one of their officers, and the charge against me having entirely fallen through."

Held, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. cap. 140, sec. 35, so as to justify an order for the taxation of the bill after the lapse of a year.

Aylesworth, for the appeal.

G. H. Watson, contra.

COCHRANE v. MORRISON.

Trial of Issue by County Judge—Powers of Judge—Rule 373.

Upon a garnishing application made after judgment in this action, which was brought in the High Court, the Master in Chambers made an order, under Rule 373, directing an issue raised by one of the garnishees to be tried before the judge of the County Court of Wellington and a jury at the then next sittings of that Court. After the order was made, the County Judge assumed to make an order directing the defendant to produce, and, the defendant failing to produce, he made a further order striking out his denial of the issue, and declaring the plaintiff in the issue entitled to the moneys in question and to judgment. These orders were entitled "In the County Court of the County of Wellington."

Held, that the county judge had no power to make the order to produce or the subsequent order; for the action was not by the order of the Master transferred to the County Court, but was still in the High Court of Justice.

H. J. Scott, Q.C., for the defendant.

Black, for the plaintiff.

[23RD MARCH, 1885.

LOCOMOTIVE ENGINE CO. v. COPELAND.

Substitutional service—Local judge—Rule 422.

The action was begun in the High Court of Justice by writ issued out of the Local Office at Kingston. Two of the defendants lived in Chicago, Illinois. The local judge at Kingston made an order for substitutional service on these defendants by serving another person resident in this province.

Held, that the Local Judge had no jurisdiction to make the order under the provisions of Rule 422.

Pattison, for the defendants.

D. Saunders for the plaintiffs.

[THE MASTER IN CHAMBERS, 4TH MARCH, 1885.

BRADLEY v. BRADLEY.

Alimony action—Payment of disbursements by defendant before trial—Counsel fee—Solicitor as counsel.

An application by the plaintiff in an alimony suit for an order against the defendant for payment before the trial of interim disbursements, witness fees, and counsel fees.

Shepley for the defendant cited *Haffey* v. *Haffey*, 7 P. R. 137.

Chas. Millar, for the plaintiff, cited *Ingram* v. *Ingram* (unreported) and *Magurn* v. *Magurn*, 4 C. L. T. 384.

In *Ingram* v. *Ingram*, Ferguson, J., affirmed an order of the Master in Chambers for payment to the plaintiff before the trial, "on account of her disbursements for witness fees $22.35, and on account of her disbursements for counsel, $40," but he thought the order should be varied, by providing that the counsel fee should not be paid if the plaintiff's solicitor acted as counsel.

THE MASTER IN CHAMBERS followed *Ingram* v. *Ingram* and *Magurn* v. *Magurn*, as to payment before the trial, and *Magurn* v. *Magurn* as to payment of counsel fee, when the solicitor was to act as counsel, and ordered the defendant to pay the plaintiff's witness fees, counsel fee and disbursements forthwith, the solicitors for the plaintiff to see to the proper expenditure of counsel and witness fees.

[25TH MARCH, 1885.

THE QUEBEC BANK v. RADFORD.

Judgment under Rule 80—Married Women's Property Act, 1884—Debt subsequent to the Act.

D. T. Symons, for the plaintiffs, moved for judgment under Rule 80 against the defendants, J. H. Radford and Anna Radford, his wife, married before the Married Women's Property Act, 1884, on a promissory note, dated 16th December, 1884, made by J. H. Radford, and endorsed by Anna Radford. There was no averment of the marriage or separate estate in the endorsement on the writ. He claimed judgment against the separate property of the wife, citing *Moore* v. *Mulligan*, W. N. 1884, p. 34, explained in *Perks* v. *Mylrea*, *Ibid.*, p. 64; *Gunston* v. *Macpeard*, 75 L. T. N. S. 102; *Brown* v. *Morgan*, 12 L. R. Ir. 122; *Kinnear* v. *Blue*, 5 C. L. T. 42.

THE MASTER IN CHAMBERS made the order for judgment; as to the wife, the debt to be levied and payable out of her separate property of which she was possessed or entitled to on 16th December, 1884, or out of any separate property which she might thereafter acquire.

CAMERON v. RUTHERFORD.

Judgment under Rule 80—Married Women's Property Act, 1884—Debt prior to the Act.

Lefroy, for the plaintiff, moved for judgment under Rule 80 against the defendants, husband and wife, married before the Married Women's Property Act, 1884, on a promissory note which matured before the coming into force of that Act. He cited *Bursill* v. *Tanner*, L. R. 13 Q. B. D. 69; *Gloucestershire Banking Co.* v. *Phillips*, L. R. 12 Q. B. D. 533. and *Weldon* v. *Neal*, 51 L. T. N. S.

Aylesworth, for the defendants.

THE MASTER IN CHAMBERS made an order for judgment similar to the order in *Quebec Bank* v. *Radford*, supra.

DAVIES v. BERRY.

Judgment under Rule 80—Married Women's Property Act, 1884—Debt subsequent to the Act.

Action on a joint and several promissory note for $708, dated the 13th day of November, 1884, payable three months after date, made by the defendants F. S. Berry and Angeline Berry, payable to the plaintiffs, the Davies Brewing and Malting Company. Writ issued 11th March, 1885; motion for judgment returnable 25th March under Rule 80. The defendant Angeline Berry was alleged to be a married woman, the wife of her co-defendant, but it was not so alleged in the endorsement on the writ.

Macrae (*R. S. Smellie*), for the plaintiffs. No one appeared for the defendants.

THE MASTER IN CHAMBERS granted unconditional judgment against the defendant F. S. Berry; but as against Angeline Berry it was directed that the amount of the judgment was "to be levied and payable only out of her separate property which she was possessed of or entitled to on the 13th day of November, 1884, or out of any separate property which she may have acquired since that date or may hereafter acquire or be entitled to, and which she is not restrained from anticipating."

THE

CANADIAN LAW TIMES.

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ONTARIO LEGISLATION, 1885.

WE have before referred to the tendency of our Legislatures to deal with particular cases and individuals, instead of confining themselves to the performance of the more important duties of legislating in general terms (*a*). We cited Sir Wm. Blackstone's definition of a law, as a rule of civil conduct prescribed by the supreme power in a state. "It is not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal." Our Legislatures are empowered by the constitution to "make laws"; but not infrequently they make judgments and decreees; and hardly a session passes without some statute being aimed at the sanctity of contracts, or the arbitrary settlement of matters which should be allowed to run their course at law.

The fifth chapter of the Acts of the last Session of the Ontario Legislature invites a renewed discussion of the principle to which we have adverted. The history of this piece of legislation is well known to every one, and a repetition of it would only be nauseating. The note of *Stuart* v. *McKim* (*b*), shows the facts under which the Common Pleas Division directed an issue to be tried, to determine whether certain money alleged to have been given to the defendant as a bribe, and by him handed to

(*a*) 4 C. L. T. 261.

(*b*) Ante p. 131.

the Speaker of the House, could be attached in the hands of the latter by a judgment creditor of the defendant. The matter being in a fair way for trial, now comes the Legislature and declares the money forfeited to the Province from the time of its delivery to the Speaker; and the act is declared to be a bar to all actions, &c., in respect of the money, relieves him from costs, and declares that if any further proceeding is taken, the Speaker shall have his costs between solicitor and client from the person instituting the proceedings. The protection intended to the Speaker is most proper; but it is a pity that dishonest money should not have been allowed to find an honest resting place in the hands of a creditor, the chances of which, before the passing of the Act, appeared to be fair.

But, to return to the principle of the enactment, Sir Wm. Blackstone is not alone in his definition of law. Austin discusses it in his chapter entitled the "Province of Jurisprudence determined." He says (*c*), "a law, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." He then distinguishes *laws* from *occasional or particular commands*. "The terms *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands, may, I think, be stated in the following manner. By every command, the party to whom it is directed is obliged to do or forbear. Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally"(*d*).

(*c*) P. 88. (*d*) P. 95.

Examples are then given of the distinction—amongst others, the following:—"an act which is not an offence, according to the existing law, moves the sovereign to displeasure; and though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule. Whether such an order would be *called* a law, seems to depend upon circumstances which are purely immaterial; immaterial, that is, with reference to others. If made by a sovereign assembly, it would probably be called a law. If uttered by an absolute monarch, without deliberation or ceremony, it would scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number" (*e*). And again, at another place, he condenses his propositions as follows:—"A law is a command which obliges a person or persons. But, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a *class*. In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct." (*f*)

A more clear distinction than that made by this eminent jurist could not well be conceived or expressed. Our statute books unfortunately are full of occasional and particular commands—a fact much to be deplored. For the more there are, the more there will be. It is not every one who can command the aid of the Legislature, and those who can do so are placed on unequal terms with those who cannot.

Public Fisheries.—Chapter 9 is to be known as *The Ontario Fisheries Act*, 1885, and is to apply to all fisheries and rights of fishing in respect of which the Legislature has authority to legislate.

(*e*) P. 96. (*f*) P. 98.

The British North America Act gives power to the Parliament of Canada to make laws respecting "Sea coast and inland fisheries." What the extent of this power is was made the subject of judicial interpretation in *Regina* v. *Robertson* (*g*). It seems to be clear from that case and *Delaney* v. *McDonald* (*h*), that rights claimed before the union were not intended to be, and were not in fact, interfered with by the Dominion Act. The Dominion Fisheries Act, 31 Vict. cap. 60, provides for the issue of licenses "where the exclusive right of fishing does not already exist by law." The object of excepting such rights seems to be merely to protect vested rights. Where an exclusive right of fishing exists it will not be disturbed. Where an exclusive right does not exist, the Act makes all fisheries subject to Dominion regulations. But even as to an exclusive right of fishing, is that not a species of property within the control of Canada and not of the Provinces? Though the exclusive rights may not be divested, are they not subject, in the hands of their proprietors, to the regulation of the Dominion? The decision in *Regina* v. *Robertson* is that a licence to fish in waters as to which an exclusive right already existed was not contemplated by the Act, 31 Vict. cap. 60 (D), and that the defendant's license was void, because the exclusive right already existed in another. That is a plain construction of the Act. It determines no constitutional question. The case decided also that where grants have been made by the Provinces of lands through which rivers flow, the exclusive right of fishing having passed to the grantee as incident to his grant, the Parliament of Canada had no right to interfere, and no Dominion license could be given. Finally, as to unpatented lands, inasmuch as they are in the Crown in trust for the people, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the people of the Province; and therefore a Dominion licence to fish in streams running through Provincial property would be illegal.

(*g*) 6 S. C. R. 52. See also *Venning* v. *Stedman*, 4 C. L. T. 180.
(*h*) 4 C. L. T. 496.

The result of this decision is peculiar. The Dominion cannot license fishing in streams, the beds of which have passed to riparian proprietors by grants of the Provinces, because the exclusive rights of fishing passed to the grantees as incident to their grants. Nor can it license fishing in unpatented lands, because these exclusive rights will pass to the grantees as incident to their grants when the lands are patented. But all lands are either patented or unpatented. Therefore the Dominion cannot license fishing in any streams which are, or may become, the subject of riparian proprietorship. It would be difficult to read this generous exception from the clause giving the Dominion legislative power over inland fisheries, in the lines of the British North America Act. The fallacy (we say it with submission) lies in the assumption that the exclusive right of fishing passes as incident to the provincial grant of the land. If it does, then it may be excepted from such a grant; and such a right excepted by the Province from a grant would be retained by and become the exclusive property of the Province making the grant. It may also, on the same hypothesis, be granted apart from the land; and so title to a fishery may, under this case, be claimed from the Provincial Government. The result is that a particular species of property falls by inference within the exclusive jurisdiction of the Provincial Legislatures, though it is in express terms made the subject of Dominion control by the British North America Act. The cases cited in *Regina* v. *Robertson* are English cases, and of course authoritative where the conditions exist for their application; but they are pertinent only where the legislative jurisdiction is not divided. Where there is nothing to remove the right of fishing from the control of that body which has control of the land, no doubt the right passes, by the common law, to the grantees of the land. But, by the British North America Act, sea coast and inland fisheries, wherever and however existing, have become subject to Dominion control. How then can they be said to be incidental to Provincial grants? They have become a distinct and separate species of property, especially removed from the control of that

body which controls the land; they are a substantive and principal, not a subordinate and incidental, species of property.

Chapter thirteen is entitled "The Administration of Justice Act, 1885." At the convivial meeting, which many of us spent under the auspices of the Osgoode Legal and Literary Society last month, one of the speakers claimed for it a more appropriate epithet than its common one of "Omnibus Act." He called it an undertaker's van, carrying away, as it does, many defunct principles of law. At the same time, however, we protest that it also performs the functions of an *accoucheur*, and ushers into existence many new principles of law.

The Courts.—Sections two, three and four of this chapter reduce the Court of Appeal from a Court of five, to a Court of four, Judges, after the death or resignation of one of the present five; and provide for the addition of one Judge to the Chancery Division. It is only two years since 46 Vict. cap. 6, the Administration of Justice Act, 1883, was passed, which increased the number of Appeal Judges from four to five, and assigned to one of them the especial duty of assisting in the Chancery Division work. In reviewing the latter Act (*i*), we suggested that it would have been better to assign the new Judge to the Chancery Division at once; and we re-asserted what we always maintained that the Court of Appeal would show a clean docket only when the Judges stopped circuit work. Their circuit work having ceased in the meantime, the most gratifying progress is being made with the Court of Appeal docket, and that too with but four Judges. The fifth Judge has not aided in Chancery work. Now the enactment by the last session places the extra Judge where he should have been at first.

Declaratory judgments.—By section five of the Act, the decision in *Brooks* v. *Conley*, ante, p. 82, becomes ineffectual as a precedent. A mere declaratory judgment may now be granted.

(*i*) 3 C. L. T. 163.

Part performance, satisfaction.—The doctrine of *Cumber* v. *Wane*, as it has been called, has been for 280 years the law of England, and still is. The whole ground was lately traversed in *Foakes* v. *Beer* (*j*), where the doctrine was affirmed, notwithstanding the disapproval of it by the Lords. The origin of the doctrine is really to be found in *Pinnell's* case (*k*), cited by *Coke* (*l*). The learned Coke says, "where the condition is for payment of £20, the obligor or feoffee cannot *at the time* appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. . . If the obligee or feoffee pay a lesser sum either *before the day*, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." The italicised words play a most important part in the note. Section six of the Act in question declares that part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation." It will be noticed that this enactment involves the declaration of a principle of law which before was not disputed, viz., that part performance *before the day* fixed for the performance was satisfaction if accepted. *On the day*, or after it, part performance was not sufficient. The enactment in question, however, does not refer to the day of performance, but to breach of the agreement. What this precise period may be is immaterial. In the case of a simple obligation to pay a sum of money on a day certain, a payment of part at any time before the day of maturity, if accepted, will be satisfaction; for there cannot be a breach before the performance is due. A breach in such a case only occurs when the day passes without payment—the debtor having, as a rule, the whole day on which to pay. Under the old law, the very act of coming on the day with part only, and paying it, was a breach, for it was not satisfaction or performance of

(*j*) L. R. 9 App. Ca. 699.
(*k*) 9 Rep. 117 *a*.
(*l*) Co. Lit. 211*b*.

the agreement. Under the present enactment, the offer to pay a less sum on the day, and the acceptance, constitute in fact a new agreement, not requiring a consideration, in substitution and extinguishment of the old one.

This legislation is in accordance with the common sense of mankind. For, argue as we will, present payment is more beneficial than deferred payment, as the common experience of life teaches us. "Even," says Lord Blackburn (*m*), "where the debtor is perfectly solvent, and sure to pay at last, this often is so; where the credit of the debtor is doubtful it must be more so." And Lord Selborne said, "It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be generally binding, though not under seal" (*n*).

Limitation of appeals.—Sections 33, 34, and 43 of the Judicature Act limit appeals to the Court of Appeal and to the Supreme Court. The seventh section of the Act in review by restricting the above sections of the Judicature Act to "actions" respecting property or civil rights, becomes an enabling Act.

By Rule 1 all actions theretofore commenced by writ, and all suits theretofore commenced by bill or information are now to be instituted by a proceeding to be called *an action*.

An action is defined by the Judicature Act, section 91, to be "a civil proceeding commenced by writ, *or in such other manner as may be prescribed by rules of Court*."

By Rule 5 it is declared that "every action in the High Court shall be commenced by a writ of summons, &c." Here is a circle around which we may forever travel without finding out what an action is. A summary proceeding for administration is commenced by motion. Rule 8 expressly provides for such a case by introducing the old Chancery practice. This is a manner of commencing a

(*m*) *Foakes* v. *Beer*, L. R. 9 App. Ca. 622.
(*n*) *Ibid.* p. 613.

civil proceeding "prescribed by Rules of Court," and therefore an action within the meaning of section 91 of the Judicature Act. But it is not an action within the meaning of Rule 5, because it is not commenced by writ. The only escape from the dilemma seems to be to hold that the word "action" in Rule 5 is the equivalent of the same word as used in Rule 1, viz., every proceeding which would formerly have been commenced by writ, bill or information. By this interpretation, however, a summary administration proceeding would be an action, because it is commenced in another manner "prescribed by Rules of Court." The result would be that only those proceedings which depend upon special statutes, &c., for a commencement otherwise than by writ are emancipated from the bonds of the limiting sections of the Judicature Act.

Indemnity in replevin.—Section 8 of the Act remedies certain hardships of the defendant in replevin. Before this Act he was indemnified against "damages," but it has been held that that word will not include solicitor and client costs (*o*). Now, such costs may be recovered, except in cases of distress for rent or damage-feasant. In addition to this the replevin bond is to be enlarged in its condition, which is to cover "all loss and damage which [the defendant] may sustain by reason of the seizure, and of any deterioration of the property in the meantime."

Copies of orders in council, evidence.—In *Langtry* v. *Dumoulin* (*p*), certain printed documents, appearing to be printed copies of the journals of the Parliament of the Province of Canada, were tendered in evidence, but rejected, on the ground that there was no proof of the originals; though they were produced from the Parliamentary Library at Ottawa and purported to be printed by the Queen's printer. By section 9 of the Act in review "any copy of an order in council [of Ontario] and any copy of a departmental or other regulation * * purporting to be printed by the Queen's printer at Toronto and published

(*o*) *Williams* v. *Crow*, 10 App. R. 391, and cases cited.
(*p*) 7 Ont. R. 499.

with the statutes of Ontario, shall be received in any Court of Justice as *prima facie* evidence of the tenor of such order or regulation." A similar section is the following one which makes similar copies of similar Dominion documents evidence. Though it is quite possible that *Langtry* v. *Dumoulin* suggested this legislation, as the whole question of putting in evidence public documents was much discussed in that case, it omits from its provisions the Journals of Parliament. Whether any material benefit would have been derived from making them evidence is questionable. The construction of a statute cannot apparently be aided in any way by reference to the proceedings in Parliament under our constitution. In *Regina* v. *Bishop of Oxford* (*q*), it was held that the speech of the Lord Chancellor in moving the third reading of a bill could be referred to as an authority. But one of the requisites is that the speech "must be made by a judge or some person whose authority would be citable if expressed in a text book. "It follows," say the Court, "that such a speech could not be made in the House of Commons, and if made at all, could only be in the House of Lords." The subject is discussed in the *Law Journal* of 15th September, 1883.

Administrator ad litem.—Section 11 of the Act gives power to the High Court to appoint an administrator to represent an estate where no probate or letters of administration have been granted.

Sub-section 2 declares that on such an appointment the same fees shall be payable in stamps, etc., as would be payable to the Crown, etc., under any Act then in force upon a grant of administration by the Surrogate Court. This is a new tax imposed, is indirect, and is apparently within the very terms of the decision in *Attorney-General of Quebec* v. *Reed* (*r*), where it was held that an Act of the Legislature of Quebec imposing a tax of ten cents upon each exhibit filed in Court was *ultra vires*, because the tax was indirect.

(*q*) L. R. 4 Q. B. D. 425.
(*r*) L. R. 10 App. Ca. 141.

Jurisdiction of Master in Chambers.—The jurisdiction of the Master in Chambers to give leave to sign judgment under Rule 80 was disputed in a recent case, unreported, we believe, as we can find no trace of it in the reports. Section 13 of the Act in review gives the Master in Chambers all the powers of a Judge, save in respect to matters excepted by sub-section (*a*) of Rule 420 and by Rule 424; and, being retrospective, it confirms whatever things done by him may have been theretofore of doubtful validity. In *Brigham* v. *McKenzie* (*s*), the Chancellor doubted the Master's jurisdiction to change the venue in County Court actions, a Judge only having jurisdiction apparently to do so. No doubt the Master in Chambers now has jurisdiction under this section. It was a rule of practice that the Referee in Chambers could not refer to a Master; and it has been held that the Master in Chambers can not refer a cause to an official referee under section 48 of the Judicature Act (*t*); nor can he refer to a Master under the Dominion Winding-up Acts (*u*). *Quære*, whether his jurisdiction in those respects is not extended by the enactment in question. The power of the Judges of the Supreme Court to limit and extend his jurisdiction by Rules of Court is, however, preserved.

Decentralization.—Section 21 gives to Local Judges and Masters in all actions brought in their counties concurrent jurisdiction with the Master in Chambers—at least we presume that such is the intention. The language used is very clumsy. Any one ignorant of our surroundings would gather from the section that there was only one County Judge other than the County Judge of York, and only one Local Master, and that they were both in one county. The section runs thus:—"The Judge of the County Court, other than the County of York, and the Local Master of the Supreme Court of Ontario, shall, in all actions brought in their county have, etc." The decentralization of Chamber

(*s*) 10 P. R. 406.
(*t*) *White* v. *Beemer*, 5 C. L. T. 182.
(*u*) *Re Joseph Hall Mfg Co.* 5 C. L. T. 90.

business will have the effect of diversifying practice to a great extent. The result is also to remove a large number of practice decisions from the base of reporting operations. It is easy to see, on appeals from Local Judges and Masters, that some of them hold peculiar views upon some practice points, and in default of appeals a practice may become settled, acquiesced in, and well understood by the practitioners in one county, while a totally difficult practice may obtain in the neighbouring county. There will be the additional inconvenience of searching for orders. It not unfrequently happens that titles depend to some extent upon chamber orders; and where the name of an action alone is given, the practitioner of the future will have an extensive field in which to search in order to ascertain where a given order has been made.

Local taxations.—Ancillary to the preceding section is section 22, which provides that, in all actions begun or pending in their offices, the deputy clerks, local masters and local registrars "shall be entitled to tax all bills of costs, including counsel fees; subject only to appeal to a Judge of the High Court." There is an exception as to infants. The design of the legislature was, we believe, to give the local officers unrestricted power to allow such counsel fees as they might think fit. But it is not at all clear that this ample power is conferred upon them by this enactment. They have always been "entitled to tax all bills of costs, including counsel fees," but they were always subject to the provisions of the tariff. The tariff provides for the granting of fiats by the taxing officers; and there is nothing in the enactment to take away that power, unless the words "subject only, etc.," take it away. They must still tax bills subject to the tariff, and the tariff remains in all respects the same, including the power to tax increased fees under fiats. Now there are two constructions to be placed on this clause. The first is that it is merely declaratory of the powers which the local officers have always exercised, and that they may tax counsel fees to the extent which the tariff allows, or to the extent to which the fiat of the taxing officer allows. The other con-

struction is a narrower one, and it appears to be the one that must be adopted if there is to be a change at all. It is that the local officers may tax all bills under the tariff, but that the taxing officers are precluded from granting fiats. As a matter of fact this construction has been adopted by the taxing officers who now refuse fiats. We presume that it is out of the question to argue that the local officers are not governed by the tariff in taxing counsel fees. If the words "subject only, etc.," mean that they are bound only by the Judge on Appeal, then they may tax all solicitor's fees in the bill without regard to the tariff; for the words "subject only, etc.," apply as much to the words "bills of costs" as they do to the words "counsel fees." If, then, they are bound by the tariff in taxing the solicitor's fees, so must they be bound by the tariff in taxing counsel fees. One or two instances will show the gratification that the Act must be to local practitioners with this construction placed upon it. By item 163 of the tariff the fee with the brief at trial is $10. By item 164 it may be increased by the local taxing officer to not more than $20 to senior, and $10 to junior, counsel. But it cannot be further increased without the fiat of the taxing officer at Toronto. If the power to grant fiats is taken away from the latter officers, the local officers can tax no greater fees than $20 and $10. In a case lasting two or three days this will be more gratifying to the loser than the winner—especially if the leading counsel charges at the rate of $100 a day. It is a well established rule that the judges will not consider questions of quantum on taxation appeals, and unless this rule is altered, the appeal given by the Act will not afford any relief. Indeed, we doubt very much if a Judge on Appeal could allow more than the amount fixed by the tariff. It is a rule of Court by which all the Judges are bound; and by the same rule the only person who can give an increased fee is the taxing officer at Toronto. Take another instance. Item 165 permits a fee of $2 on an argument in Chambers proper for the attendance of counsel. It may be increased in the discretion of the *Master in Chambers* or the *Master in Ordinary*. In all matters

taken in Chambers before Local Judges and Masters the effect of this section is to absolutely preclude the taxation by local officers of any higher fee than $2. If the broader view of the Act be taken, there will still be a difficulty; for the Master in Chambers will not readily grant fiats in matters which have not been argued before him; and even if he does, the party applying will be put to the expense of obtaining the fiat without power to recover it. There is a provision in the tariff for charging the expense of getting the taxing officer's fiat (Rule 544, item 19), but none for getting that of the Master in Chambers or the Master *in* Ordinary. There will however be a gain to local practitioners; for where they before got no fee for Chamber applications, they will now get at least $2. Whether or not the local officers can tax any fee for settling pleadings, etc., is doubtful, item 171 making the fee taxable "in the discretion of the taxing officer in Toronto." The qualification to the enactment—"subject only to appeal to a Judge of the High Court"—appears to be aimed at revisions, which are consequently things of the past. Altogether, the the section is not a model piece of drafting. It either means nothing at all, except the abolition of revisions, or else it means something which local practitioners would rather not have.

Appeals from County Courts.—Section 23 of the Act in review gives power to appeal to the Court of Appeal direct from a judgment of a Judge of the County Court, without moving in term. "The intermediate appeal from the considered judgment of the Judge at the trial to the same Judge sitting the next week as *in banc* is a useless proceeding" (*v*). But it was thought feasible even before this Act to bring a County Court appeal on in this way (*w*).

Division Court Practice.—By the Division Courts Act, 1880, section 14, it was enacted that where the jurisdiction of any Division Court was disputed by any defendant, primary debtor or garnishee, he was to leave a notice with

(*v*) Per Patterson, J.A., in *Williams* v. *Crow*, 10 App. R. at p. 313.
(*w*) *Ibid.*

the clerk of the court to the effect that he intended to dispute the jurisdiction, "and in default of such notice disputing the jurisdiction of such court the same [should] be considered as established and determined." In *Clarke* v. *Macdonald* (*x*) it was held that where such a notice was omitted, though no objection could be taken in the Division Court to the jurisdiction, the jurisdiction of the High Court to prohibit the proceedings was not ousted. The law is now changed by section 1 of chapter 14 of the Acts of last session, and the jurisdiction of the High Court is expressly taken away by the words of the section, that "prohibition to a Division Court shall not lie in any suit from any court whatever, where such notice disputing the jurisdiction has not been duly given as aforesaid."

In *Re Evans* v. *Sutton* (*y*), it appeared that in one Division Court at least it was the settled practice to grant judgments without proof, where the defendant disputed the plaintiff's claim but did not appear at the trial. To use the words of the learned Judge, who presided, "In these courts (the Superior Courts), of course, a plea disputing plaintiff's right to recover casts upon him the onus of making out a case, but in the Division Courts the practice is that a notice disputing the plaintiff's claim has no effect beyond delaying the recovery of judgment, unless the defendant appears at the hearing to sustain his defence" (*z*). But Mr. Justice Cameron thought otherwise, and granted prohibition, remarking that he was much surprised to learn of the practice, and that "had the learned Judge himself not reported that the practice prevailed, I should have scarcely deemed it possible upon less convincing evidence that it could exist, as it seems contrary to natural justice." *Mais, nous avez changé tout cela.* By section 3 of chapter 14, where the service of a special summons is proved, and final judgment has not been entered, "the judge may, if the defendant does not, in person or by agent, appear in open court pursuant to and as required by said summons, give judgment against such defendant by default, without requiring proof of the plaintiff's

(*x*) 4 Ont. R. 310.
(*y*) 8 P. R. 367.
(*z*) *Ibid.* at p. 371.

claim or demand, and with the same consequences and effect as if the plaintiff had proved his claim or demand in open court." The concluding words take away from the defendant a right which he has in case judgment by default is entered against him for not disputing the plaintiff's claim. In such cases the judge has power to set aside such judgment, and permit the case to be tried, on sufficient grounds shown (*a*). Where judgment by default is gfven at the trial under the new law, the defendant can only move for a new trial. The wisdom of this enactment may well be questioned.

The practice of giving speedy judgments which obtains in the High Court will now be the practice in Division Courts, section 4 of the Act in review making provision for a proceeding similar to that under Rule 80 of the Supreme Court of Judicature. The section is made retrospective, and its provisions are declared to have been in force since 22nd August, 1881, the day of the coming into force of the Judicature Act. What object the Legislature could have had in making it retrospective it is difficult to conceive. Some Division Court Judges thought the practice of the Judicature Act did not apply to Division Courts (*b*), and some thought that it did (*c*). Those Judges of the Supreme Court of Judicature who had occasion to deal with the question upheld the fcrmer and determined that the Judicature Act did not effect Division Courts (*d*).

One peculiarity of the enactment is that it does not apply to any action in which the amount of the claim does not exceed $40. If the provisions of the Judicature Act were in force at all before this Act they were in force in all actions without regard to the amount in question.

(*a*) R. S. O. cap. 47, sec. 79, s-s. 3.

(*b*) *Cowan* v. *McQuade*, 19 C. L. J. 108; *B. & L. Association* v. *Heimrod*, 3 C. L. T. 361.

(*c*) *Burk* v. *Brittain*, 19 C. L. J. 74.

(*d*) *Clarke* v. *Macdonald*, 4 Ont. R. 310, citing *Pryor* v. *City Offices Co.*, L. R. 10 Q. B. D. 504, where the same point was determined; *Bank of Ottawa* v. *McLaughlin*, 8 App. R. 545; *Re Willing* v. *Elliott*, 37 U. C. R. 320; but see *Macnce* v. *Ontario Bank*, 3 C. L. T. 360; *Fletcher* v. *Noble*, 9 P. R. 256; and see High Court Practice in Superior Courts, 3 C L. T, 374.

The question, as far as giving judgment before trial is concerned, is now at rest. The wisdom of introducing this practice is doubtful. It will, no doubt, be a great hardship in many cases, for the preparation of affidavits and notices, the copies and service will increase the costs of the action; and these costs will apparently be recoverable against the defendant. Such motions will also, we imagine, be conducted and defended by solicitors, which will again increase the costs. But that is not the greatest evil. The judge holds his chambers at the county town; and at his chambers the motions will be returnable. Under this Act, then, a defendant may have served upon him a notice to shew cause after two days at the county town why judgment should not be entered against him. This, under a system which has made these Courts a cheap mode of trying small claims, will utterly ruin their usefulness in that respect. The defendant instead of awaiting the arrival of the judge to hold Court, is put to the annoyance and expense of defending himself at two day's notice in the county town.

By section 11 of the Act in review, provision is made for service of process on agents of corporations who have not their chief places of business in the Province. *Re Guy* v. *G. T. R. Co.* (*e*), is the latest case in which the matter was discussed on a motion for prohibition, and some of the leading cases are reviewed in it. The want of power to proceed against such corporations seems to have been in the absence of any provision for effecting service of process upon them; but in *Guy's* case where the company did appear, Mr. Justice Osler held that they had submitted themselves to the jurisdiction. This Act cures the defect.

(*To be concluded.*)

(*e*) 10 P. R. 372.

EDITORIAL REVIEW.

An Ancient Marriage Settlement.

A correspondent has sent us the following translation from the original Saxon, of a marriage settlement made in Kent, England, in the reign of Canute.

"Here appeareth in this writing the agreement that Godwine made with Byrhtric when he his daughter wooed, that is, first, that he gives her one pounds weight of gold, so as she his agreement received, and he giveth her those lands at Strete with all that thereto appertaineth, and in Burwaremersh one hundred and fifty acres, and thereto thirty oxen, and twenty cows, and ten horses, and ten bondmen. This was spoken at Kingstone before Cnute being in Living the Archbishops witness, and in the convents at Christ Church, and Ælfmeres the Abbotts, and the convents at S. Augustine, and Æthelwines Sheriff, and Siredes the elder, and Godwines Wulfeyes son and Ælfsy child, and Eadmer at Burham, and Godwine Wulfstanes son, and Charles the Kings Knight, and when men that maiden fetched to Brightling, then went all of this in pledge Ælfgar Syredes son, and Frerth priest of Folkstone and of Dover Leofwine priest, and Wulfsy priest, and Edred Eadehues son, and Leofwine Wærehues, and Cenwold rust, and Leofwine Godwines son at Horton, and Leofwine the red, and Godwine Eadgifes son, and Leofsun his brother.

And whichsoever of them longest liveth take all possessions as well as that land that I to them give as everything. This thing is known to all valiant men in Kent, and in Sussex of Thanes and of Curles, and this writing is threefold, one is at Christ-church, another at S. Augustine, the third hath Byrhtric himself."

Counsel's Convenience.

When the Court of Appeal met for business the other day, the appeals were not proceeded with in the order in which they stood upon the docket owing to the absence on circuit of leading Counsel. There is no lack of Counsel, but rather the contrary; and we now protest, most respectfully, but most unequivocally and emphatically, against the course that was adopted. There are hundreds of capable men waiting for business that flows into the hands of a few—a very few—overworked men. The business is the business of the suitor, not of the barrister, and it is the business of the suitor, or his solicitor, to retain counsel to represent him when his case is called; and if he cannot get one, then to get another. The business before the court should go on when the court is ready, and the public, as well as the profession, have a right to this. In an exceptional case, we freely admit, a postponement may be quite proper in order that Counsel may be instructed; but the fact that half a dozen gentlemen have so many engagements that they cannot keep them all is no reason why the court should not proceed.

The Osgoode Society's Dinner.

The most successful gathering of the kind that the society has ever had was that which took place in Osgoode Hall last month. The Benchers have received the informal thanks of the profession for consenting to place the great hall at the disposal of the society.

The speeches were excellent without exception, the Chief Justice of Ontario throwing his audience into successive fits of laughter with his brilliant witticisms, and the Chancellor winning the admiration of all by his remarks upon improvements in the administration of justice (the prevalence of equity, of course, being the greatest), and by his excellent advice to the juniors.

REVIEW OF EXCHANGES.

American Law Register.—November, 1884.

Power of Partners to withdraw at Will from Partnerships entered into for a Definite Period, by BENJAMIN F. REX. There is no conflict of authority upon this subject in England: the settled rule, both at law and in equity, declines to admit such power. The American cases are discussed, and shown to substantiate, by a preponderance of authority, the same doctrine. Assignments in bankruptcy, and marriage, as effecting, *ipso facto*, a dissolution of the relationship, are severally considered. In the first case the determination is said to turn upon whether the assignment is voluntary or compulsory. Anciently, the marriage of a partner who is a *feme sole* either with her co-partner or with a stranger dissolved the partnership, if the latter was at will only; but the rule may now be different where statutes have removed the common law disabilities of married women. There is said to be no determination of any Court of last resort upon the effect of marriage where the partnership is for a definite period. Subsequent lunacy will not dissolve a partnership.

Ibid.—December, 1884.

Liability of Live Stock Carriers, by ADELBERT HAMILTON. The authorities are examined in relation to the liability of railway companies, steam and canal boat proprietors for injuries to cattle while in transit. Generally, the rules affecting the responsibility of common public carriers apply. What limit such carriers may place upon their liability is treated of, as well as the questions of the measure of damages and burden of proof.

American Law Review.—March-April, 1885.

The Relation of the Judiciary to the Constitution, by WM. M. MEIGS. A peculiar and distinctive feature of American jurisprudence is the power of Courts, in suits between parties, to hold that certain legislative enactments are unconstitutional, and to refuse to enforce them. It is the generally accepted opinion that where an enactment has been so pronounced upon by the Judiciary, the decision is binding not only upon the parties to the suit, but upon the other branches of government and all other citizens. The learned writer, after an historical review of the earlier cases in which the power has been exercised, proceeds to combat this view, fortifying his argument by citations from the written opinions of eminent authorities upon the constitution. The subject is not without interest to Canadians.

The Responsibility of the Pullman Palace Car Company for Thefts from Passengers, by STERLING B. TONEY. Whether considered as carriers of goods or as carriers of passengers, the company are not responsible. They are not inn-keepers, but even as inn-keepers they could only be held liable where the goods of the passenger were intrusted to their care. The decisions of Courts of last resort are shown to support uniformly these views.

The Disposition of the Body after Death, by FRANCIS KING CAREY. Beginning with a brief historical outline of the social laws and customs of different peoples ancient and modern regulating the disposition of the dead body, the article proceeds with a statement of the present attitude of the American law upon the subject, indicating such changes as have been made in the old common law doctrines, whether by statute or by the more modern opinions of the Courts. Suggestions follow for statutory provisions to bring about a more orderly and decent state of affairs than at present exists in reference to the supply of subjects for the dissecting-table, and for the protection of the grave.

Central Law Journal.—2nd January, 1885.

Causal Connection in Joint Crimes, by FRANCIS WHARTON. Mere sympathy with a crime does not impose responsibility; nor does mere non-intervention by a person present at its commission, unless it was the duty of the party so present to interfere, and he was not prevented from such interference by superior force, or unless his presence contributed to the commission of the crime. Even where there is a criminal confederacy, individual confederates are not responsible for collateral crimes committed by their associates, unless such are the natural and probable outcome of the confederacy. So, to constitute accessoryship before the fact, the crime must be the natural and probable result of the counsel or command. Detectives, entering into a criminal conspiracy already formed, for the purpose of exposing it, are not accessories before the fact, when the offence is a felony, nor accomplices when it is a misdemeanor.

Ibid.—9th January, 1885.

Summary Remedies in Cases of Railway Discrimination, by CHARLES CHAUNCEY SAVAGE. The remedies treated of are those by injunction and mandamus, and the distinction to be observed in their respective application is pointed out. The American cases in which these remedies have been granted or withheld are reviewed.

Ibid.—16th January, 1885.

Necessity for Proof of Manual Delivery of Deeds—when dispensed with, by THOS. W. PIERCE. Such delivery may be presumed from concurrent acts of the parties recognizing a transfer, but intent to vest in the grantee the custody of the instrument, no less than the estate, is essential. It is generally presumed that a deed found in the possession of the grantee has been delivered. Delivery after the death of the grantor is no delivery, unless made under some agreement entered

illegal tax, under mistake of law but with knowledge of all the facts, cannot be recovered back. "As a general rule, where the payment has been made under mistake of fact, an action to recover money paid for taxes will lie only when the following requisites co-exist. 1. The assessment must be absolutely void, and not merely irregular. 2. The money paid must have been actually received by the defendant for his own use, and not as mere agent. 3. The payment by the plaintiff must have been made involuntarily, and upon compulsion to prevent the immediate seizure of his goods, or arrest of his person." The proper form of remedy is an action for money had and received, and not mandamus.

Ibid.—27*th March*, 1885.

What Constitutes a Sufficient Tender, by M. W. HOPKINS. An exhaustive article, digesting the English and American decisions.

Law Journal.—19*th July*, 1884.

The New Third Party. The opinion is expressed that third party procedure should be abolished altogether, on the ground that experience has proved it to be unsatisfactory and expensive, and tending to embarrass the trial of the main issue. English cases under the late rules limiting the right of the defendant in this particular are considered.

Copyright in Lectures. The leading case of *Abernethy* v. *Hutchinson* is adversely criticised, as well as the later case of *Nicols* v. *Pitman*, 53 Law J. Rep. Chanc. 552.

Ibid.—26*th July*, 1884.

Estoppel by Judgment. Remarks upon the case of *Priestman* v. *Thomas*, 53 Law J. Rep. P. D. & A. 59. "It is obvious that this decision, and those on which it is based, considerably extend the original doctrine of estoppel by record. That form of estoppel was based on the existence of a record which on the face of it contained a decision on the matter in question. In the days when pleadings were full and the issues well defined, any matter which had been decided would probably appear on the record. Still, even in those days, the judgment might necessarily be a decision on a question of fact which did not appear in the record, and there is, so far as we know, no decision among the older reports that estoppel is confined to issues appearing on the record."

Ibid.—1*st November*, 1884.

Taking Mortgages from Clients. The rules are laid down as to the duties and liabilities of solicitors in lending money to their clients on mortgage, with regard to the power of sale to be inserted in such mortgages. The usual power must be inserted, or the effect of its absence or modification specially explained to the client.

Ibid.—8*th November*, 1884.

The Test of the Incidence of the Cost on Taxation. Where a solicitor sends in a bill of costs, and adds to the total the words "say so much," naming a lesser figure, the amount of the bill is, for the purpose

of deciding who is to pay the costs of taxation, the total, and not the lesser amount. Such is the decision in *Re Paull*, 53 Law J. Rep. Chanc. 871. A contradictory decision is *Re Carthew*, 53 Law J. Rep. Chanc. 927. The reasoning in the two cases is given, and the former approved. "It follows, therefore, that the lump sum at the foot of the solicitor's bill is a mere offer. It has no binding force whatever, still less can it properly be looked upon as the amount of the bill delivered for taxation which is to decide whether the solicitor or the client is to bear the cost."

Ibid.—*15th November*, 1884.

Undertakings as to Damages. The undertaking as to damages usually given upon interlocutory injunctions was originally inserted only where such were obtained *ex parte*, the idea being to protect the Court against misrepresentation. In England, the practice is now extended to interlocutory injunctions obtained *inter partes*. It is urged that this extension is improper, as unjustly rendering a party liable for the error of the Court upon a question of law; and a suggestion is made that such undertakings should be confined to cases where there is misrepresentation or suppression.

THE

CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[28TH JANUARY, 1885.

LANGTRY v. DUMOULIN.

Leave to appeal by stranger to record—Interest—Rector and churchwardens.

The defendant Dumoulin being satisfied with the decisions of the Courts below, 7 Ont. R. 499, 644, and having refused to further prosecute the action, an application was made by the churchwardens of St. James' Cathedral, of which the defendant Dumoulin was rector, for leave to substitute their names for his on the record, and to appeal from the judgment of the Divisional Court, 7 Ont. R. 644, claiming (i) an an interest in the action, (ii) that he was in fact their trustee, and that they had the right to use his name in these proceedings. It appeared that the defendant had denied his alleged trusteeship before the case was heard by the Divisional Court.

Held, that there was no such interest in the applicants as entitled them to maintain the action, and that the defendant Dumoulin was not, on the construction of the deeds in evidence a trustee for them.

Howland, for the applicants.

S. H. Blake, Q.C., for the defendant Dumoulin.

FERGUSON, J.] [13TH JANUARY, 1885.

PETRIE v. GUELPH LUMBER CO.

Deceit—Representations untrue in fact but believed to be true.

The defendants other than the company being directors of the defendant company made certain representations concerning the affairs of the company, which they believed to be true, but which were not in fact true, and procured the plaintiff and others to take stock in the company. The company was at the time insolvent.

Held, in an action for deceit that the defendants were not liable.

McCarthy, Q.C., and *Plumb*, for the appellants.

Robinson, Q.C., and *Cassels, Q.C.*, for the respondents.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 12TH FEBRUARY, 1885.

BRIDGES v. THE REAL ESTATE LOAN CO.

Action by second mortgagee against assignee for value without notice of first mortgage—Defence—Registry Act.

Y. being the owner of certain land mortgaged it with other land to the M. P. B. Society by mortgage dated 12th July, 1873, registered 14th July, 1873. Subsequently, being desirous of selling part of the property and paying off the mortgage, by an agreement in writing he arranged with the Society to leave the mortgage standing, take a further loan of $700, and have certain of the lands released (of which the lot in question was part) by the Society. A second mortgage for the $700 advance was prepared and executed dated 1st February, 1875, registered 11th February,

1875, which, by mistake, included all the lands in the first mortgage and a release dated 9th February, 1875, was duly executed by the Society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. B. the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question which should have been omitted, lent Y. certain moneys, and took a mortgage dated 31st May, 1877, registered 6th June, 1877, to secure the payment thereof. The Society assigned the mortgage and all moneys secured thereby to the defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883, Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to him, it was

Held, affirming the judgment of Ferguson, J., that the combined operation of R. S. O. cap. 11, sec. 81, and R. S. O. cap. 95, sec. 8, formed a complete defence to the plaintiff's action, and that, whatever doubt may have existed before, there is now none that the assignee of a mortgage for value, having the legal estate, may defend as a purchaser for value without notice, and claim also the protection of the Registry Act as against a subsequent purchaser or mortgagee.

G. Bell, for the plaintiff.

A. C. Galt, for the defendant.

[21st March, 1885.

In Re FOX.

Will, construction of—Conditional devise—Power of sale.

The petitioner in a quieting title application, claimed title as devisee under a will which contained the following provisions :—"Secondly, I devise to my son, J. F., the S. ½ of Lot No. 1, in the 10th concession of the County of P., containing 50 acres more or less, but he is to be known as a sober, steady, and industrious man. Thirdly, If at any time during the period of five years after my death it appears to my executors hereinafter named, that my said son J. does not remain sober, I give them power to sell and dispose of the said property for such charitable purpose as to them shall seem meet."

Held, that the power of sale in the will was valid, and that the certificate of title to J. could only issue subject to the power.

W. H. P. Clement, for the petitioner.

CORE v. ONTARIO LOAN CO.

Registered title—Equitable charge—Priority.

W. and his son, W. W., in consideration of $4,000, made a mortgage of separate parcels of land owned in severalty by them to the defendant company, containing a proviso for releasing W. W.'s land on payment of $500. The covenant for payment was joint. W. W. sold his land to J. W. W. then mortgaged his lands to the plaintiff by an instrument which declared it subject to the company's mortgage. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but there was no notice of this to the plaintiff by registration or otherwise.

Held, reversing the judgment of Proudfoot, J., that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's land with the $500 for which he had made his land liable, and that the plaintiff was therefore entitled to recover his mortgage out of his father's land before W. W. could charge it with the $500.

Grey v. *Ball*, 23 Gr. 394, approved and followed.

CANADIAN LAND AND EMIGRATION CO. v. THE TOWNSHIP OF DYSART.

Assessment—Jurisdiction of High Court to entertain action without appeal from Court of Revision.

On an appeal from the judgment of Ferguson, J., ante, p. 143, to the Divisional Court, the Court was divided, and the judgment appealed from was therefore sustained.

Per Boyd, C. The claim of the plaintiffs to the interference of this Court is not one of absolute right but one resting on judicial discretion, and that discretion was rightly exercised in dismissing the action. The stipendiary magistrate has power to deal with the matters in question in the most ample manner. The statute intends that the value of lands shall be fixed by the municipal authorities, and not until all statutory means have been exhausted should recourse be had to this Court for relief. No authority has been cited for making this Court subsidiary to the appellate tribunal created by parliament, and making it undertake the duty of disposing of appeals which could be effectually done by the stipendiary magistrate. As to costs, the defendants are to blame for not having placed a demurrer on the record, and so had the preliminary question of law decided before the trial; and they should not be allowed to withhold a demurrer and reap large costs which might not have been

incurred if they had by their pleadings notified the plaintiffs that they would object to the plaintiffs' right to litigate. The costs of the motion for injunction should be given to the defendants and further costs should be given thereafter as if the defendants had successfully demurred, and the costs of this appeal are to be given to the defendants.

Per Proudfoot, J. The special Act for the territorial division of Haliburton, R. S. O. cap. 6, sec. 23, gives an appeal to the stipendiary magistrate against any *decision* of the Court of Revision. The action of the Court was a mere travesty of a judicial proceeding. The function of the Court was judicially to hear and determine. The action of the Court in deciding in opposition to the only evidence given before them, appears to establish that the whole was a fraudulent arrangement by the members of the Court of Revision. To give the stipendiary magistrate jurisdiction, the Court of Revision must have given a *decision*. The admission that the action of the Court was fraudulent, in effect determines that there was no *decision*. A judgment is vitiated and void from the corrupt and fraudulent acts of the litigants, and a litigant has much more reason to complain of an unjust judge than he has of an unjust antagonist. It was not intended by the legislature that it should be the duty of the stipendiary magistrate to enquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. In the case of an alleged fraudulent judgment the jurisdiction of the Superior Courts is not taken away. The stipendiary magistrate's jurisdiction is confined to an appeal from a *decision*. If this Court has jurisdiction, as it certainly has where the acts complained of are vitiated by fraud, we cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy. I agree with the Chancellor as regards the costs.

S. H. Blake, Q.C., and *Cassels, Q.C.*, for the plaintiffs.

McCarthy, Q.C., and *Hudspeth, Q.C.*, for the defendants.

CAMERON v. CARTER.

Purchase by instalments—Outstanding mortgage—Rights of purchaser.

Cain agreed to sell certain lands to Carter for $1400, payable in yearly instalments of $100 each with interest, and he covenanted that on payment of the said sum of money he would convey the said lands to Carter by a good and sufficient deed in fee simple. There was at the time of this agreement a mortgage on the property still in force, but of which the principal money would be payable before the last instalment of the purchase money would be due under the agreement.

Some of the instalments being unpaid, Cameron and Campbell, to whom Cain had assigned the agreement, sued Carter for the amount.

Carter defended on the ground that he would be entitled either to have the mortgage paid off, or to be secured against it, before he could be forced to pay the instalments of purchase money.

Held, that the plaintiffs were bound to ensure the defendant in making the intermediate payments that he, the defendant, would have a good title, free from encumbrances, when the period of completion of the contract had arrived. They were not justified in seeking to enforce payment of all the instalments, leaving a merely personal remedy for the defendant in case the plaintiffs should not be in a position so to convey. When the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title made before he makes any payment. *Gamble* v. *Gummerson*, 9 Gr. 199, approved of.

H. J. Scott, Q.C., for the defendant.

A. H. F. Lefroy, for the plaintiff.

[BOYD, C., 22ND APRIL, 1885.

TOWNSHIP OF ADJALA v. McELROY.

Principal and surety—Municipal treasurer—Annual re-appointment—Misconduct—Condoning misconduct—Release of sureties.

A treasurer was appointed by the plaintiffs under R. S. O. cap. 174, by sec. 274 of which all officers appointed by a Council shall hold office until removed by the Council. He furnished a bond dated 1st November, 1880. He was re-appointed annually for several years.

Held, that the re-appointments were not equivalent to removals and re-appointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged.

The treasurer having failed to account for large sums, the Council of the plaintiffs caused a letter to be written to him on 27th February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle, and the Council did not carry out their threat. In 1883, the Council, again becoming dissatisfied with the treasurer, passed a resolution that no further payments should be made to him, but that all moneys should be paid into a certain Bank. In 1884, the Council for that year rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice was given to the sureties.

Held, that the plaintiffs had failed to perform their duties by retaining the treasurer in office after they became aware of his defalcations, and that the sureties were released from all liability after 27th February, 1882. A reference was granted at the plaintiffs' election to take an account of the amount due under the bond up to that date.

BANK OF HAMILTON v. NOYE MANUFACTURING CO.

Warehouse receipts—Validity of—Negotiation of note—Commingling of property—Tracing property covered by receipts—Affidavit evidence.

T. a miller, gave warehouse receipts for wheat to the plaintiffs attached to notes payable to their order to take up notes maturing, which were secured by like receipts. The receipts were in the following form :— "Received in store in my warehouse or mill from farmers 2,000 bushels wheat to be delivered to the order of myself to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 43 Vict. cap. 22. The said wheat is separate from and will be kept separate and distinguishable from other grain." The receipts were endorsed in blank.

Held, that the notes and receipts attached might be read together; that the endorsement of the receipts in blank was, under the circumstances, unobjectionable, and that they were valid in the hands of the Bank.

Held, also, that the mode of acquiring them, viz., by delivering up the maturing notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes; or at any rate there was a mere substitution or continuation of securities.

T. did not keep the wheat covered by the receipts distinct, but ground some of it, and allowed the remainder to be mixed with wheat subsequently brought in. Before assigning in trust for creditors he pointed out to the Bank one car load of flour made from the wheat covered by the receipts, and pointed out to the Bank wheat in his mill which he admitted was covered by the receipts, and the next day the Bank took and kept possession. He subsequently assigned, and the defendants thereafter recovered a judgment against him. On an interpleader issue,

Held, that the plaintiffs were entitled to the wheat taken possession of by them.

Leave given to supplement the evidence given at the trial by affidavit evidence of documents under Rules 271 and 282.

TRAVIS v. TRAVIS.

Donatio mortis causa—Gift inter vivos.

The defendant's mother, not expecting to live, gave the key of a cabinet where a mortgage made by the defendant was kept to her son J., telling him that she wanted him to give the mortgage to the defendant in case she had not the privilege of seeing him again. The defendant was then sent for and came to the house. He saw his mother alone, and deposed

that she said, "Robert, your mortgage is there in that drawer. When you go home you can take it with you." He went away without getting the mortgage, and she died intestate. He subsequently got possession of the mortgage.

Held, that the mandate to J. was revoked when the intestate subsequently saw the defendant, and as there was no delivery after that, there was no gift of the mortgage to him.

At the time that the intestate gave the key to J. she told him to endorse a receipt on the mortgage for interest, which he did; and she also gave the defendant a signed receipt for interest,

Held, a valid gift of the interest.

SMITH v. SMITH.

Will, construction of—Heir or heirs equivalent to child or children.

A testator made the following devise:—"I will to my son, J. S., for the term of his natural life, the farm, etc.; but if my said son J. S. should have a lawful heir or heirs, the said lands shall be equally divided among them at the death of their father. But if my said son J. S. shall die without having lawful heirs, then in that case I direct the said lands to be sold and the proceeds divided equally among my remaining children or their heirs."

Held, that the words "heir or heirs" in the first clause, and "heirs" in the second clause, meant "child or children" and "children" respectively

J. S. had a living child at the time of the action, and it being sufficient for the purpose of the action to declare that J. S. was neither tenant in fee simple nor tenant in fee tail in possession while the child lived, it was so declared.

DAVIS v. HEWITT.

Horse racing—Illegal contract—13 Geo. II. cap. 19. (Imp.)

D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P.

Held, that the race was an illegal one, under 13 Geo. II. cap. 19 (Imp.), one of the participants not being the owner of the horse upon which he

bet; and P. was bound to pay over the deposit made by D, on demand made by him before disposal of it.

Moss, Q.C., and *Wilson*, Q.C., for the plaintiff.
A. J. Wilkes, for the defendants.

[PROUDFOOT, J., 18TH FEBRUARY, 1885.

ZUMSTEIN v. HENDRICH.

Will—Devise to son who died before testator—R. S. O. cap. 106.—Lapse.

H. made his will on 10th October, 1868, devising land to his son J. without words of limitation, and added a codicil on 23rd February, 1870, by which he confirmed the will save as changed by the codicil. J. the devisee died on the 17th February, 1874, and H. the testator died on the 15th December, 1879.

Held, that, as the will was made and republished by the codicil prior to 1st January, 1874, the sections subsequent to section 7 of R. S. O. cap. 106, and among them section 35, did not apply, and that the former law as to lapse governed this case, and that under that law the devise to J. lapsed.

[22ND APRIL, 1885.

In re LAKE SUPERIOR COPPER COMPANY.

LAKE SUPERIOR COPPER CO. v. PLUMMER.

Company—Creditor delaying at Company's request—Winding-up—Restraining action by creditor—Setting aside order made by Court of co-ordinate jurisdiction.

A petition by a creditor to rescind a winding-up order made by Ferguson, J., under 45 Vict. cap. 23 (D), and 47 Vict. cap. 39 (D), on the ground that the company was incorporated in the United Kingdom, was refused (without an expression of opinion as to the power of the Parliament of Canada to provide for winding up foreign companies), on the ground that the application should have been made to a Court having appellate jurisdiction, and not to a Court of co-ordinate jurisdiction.

P., a creditor of the company on a bill of exchange accepted by the company for the balance of an account stated, was requested by the manager and secretary at various times not to take proceedings, in consequence of which he delayed taking proceedings. A winding-up order having been made, P., a few days afterwards, commenced an action in the State of Michigan against the company. An *ex parte* injunction was granted restraining him from prosecuting his action. On a motion to continue this injunction,

Held, that P., having delayed at the request of the company, was entitled to be preferred, and the motion was refused.

Semble, that, in the absence of the request for delay, P. would have been allowed to proceed with his action on an undertaking to abide by any order the Court might make, there being creditors in Michigan who might have gained priority.

In re CHAPMAN AND McLOUGHLIN.

Will, construction of—Devise upon attaining twenty-one—Dying without children—Restraint on alienation.

A testator made his will in 1850 as follows:—"I give to my grandsons, Felix and John, upon their arrival at twenty-one respectively, or to the survivor of them, should either die without lawful children, the said lot as follows: to Felix and his heirs the W. ½, and to John and his heirs the E. ½, with power to either of the said devisees or their heirs to assign to the other or his heirs, but not otherwise, as I wish the said land to remain in the family." Felix attained twenty-one, and died a year afterwards without issue, never having been married, leaving a sister and John his heirs-at-law. John attained twenty-one.

Held, that, upon Felix and John attaining twenty-one, each took a fee in the land devised to him—the dying without children meaning so dying before twenty-one.

Held, also, that the restraint on alienation was void.

In re OAKVILLE AND CHISHOLM.

Registered plan—Amendment—Assigns of persons registering—Prohibition.

Land was granted to Col. Chisholm in 1831, and in 1832 was mortgaged by him to F. and others, to whom, on 7th March, 1836, he released his equity of redemption. On 1st August, 1836, a survey and plan were made, apparently at the instance of Col. Chisholm, covering the land, a portion of which was shown as Water street. The plan was registered by Col. Chisholm's executors on 12th January, 1850. In May, 1852, F. and others conveyed to R. K. C. and T. S., and, in 1857, T. S. released to R. K. C. The latter made an application to the County Judge to amend the plan by closing up a portion of Water street.

Held, that R. K. C., claiming under F. and others, whose title was paramount to the plan, was not an assign within the meaning of the Registry Act, R. S. O. cap. 111, sec. 84, and that the County Judge had no jurisdiction, on his application, to amend the plan; and prohibition was granted.

MORTON v. HAMILTON PROVIDENT LOAN SOCIETY.

Costs, scale of—Claim to equitable relief—Rule 515.

The plaintiff mortgaged certain lands to the defendants, and default having been made the defendants sold the lands under their power of sale, and afterwards rendered a statement claiming $182.61 as due to them under their mortgage, in addition to the amount derived from the sale and such amounts as had been paid by the plaintiff before default. The plaintiff brought this action for an account claiming that the defendants had received more than they were entitled to, and that the defendants might be declared trustees for the plaintiff of the excess. The action was referred to a Master, who reported that he had taken the accounts, and that he found a balance due to the plaintiff of $123.27. The judgment on further directions ordered the defendants to pay to the plaintiff the amount found due, with costs. The taxing officer taxed the costs on the higher scale.

Held, that the defendants' liability was not a legal one as for a money demand, but that the claim was for equitable relief, and the action could not have been brought in the County Court, nor was it a case under Rule 515 for costs on the lower scale, for the amount involved was $305.88 ($182.61 plus $123.27), a sum beyond the former equitable jurisdiction of the County Court, and therefore the taxing officer was right in taxing the costs on the higher scale.

Muir, for the defendants.
G. H. Watson, for the plaintiff.

[FERGUSON, J., 31ST MARCH, 1885.

LEAN v. HUSTON.

Article patented in foreign country—Improvements—Original ideas—Employment of mechanic to make model—Breach of confidence—Restraining manufacture under a patent obtained by him.

The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the article with some improvements patented in Canada, one of them employed one of the defendants, a mechanic, to make a model, and under the pledge of secrecy placed the United States patent in his hands and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article under which he and the other defendants were manufacturing. In an action brought to set aside this patent and for an injunction restraining the manufacture by the defendants of the article, in which action it was contended on their behalf that the article was not protected in Canada by the United States patent, and in fact that the idea was public property, it was

Held, following *Morison* v. *Moat*, 9 Ha. 241, that the plaintiffs had the right to the injunction; that their title was good as against the defendants, even though they might not have a good title against the public, and the injunction was granted.

Moss, *Q.C.*, and *F. E. Hodgins*, for the plaintiffs.
Bain, *Q.C.*, and *Malone*, for the defendants.

[MARCH, 1885.

GRANT v. LA BANQUE NATIONALE.

Banks and banking—Pledge of timber limits to bank—Additional security—Quebec regulations as to timber on Crown Lands—34 Vict. cap. 5 (D), secs. 40, 41.

Held, that sec 28 of the revised regulations respecting the sale and management of the timber on Crown Lands in the Province of Quebec, which provides that lien holders "in order to enable them to obtain advances necessary for their operations" shall have a right to pledge their limits as security without a bonus becoming payable, is not to be restricted in meaning to pledges for future advances.

In 1877 F. obtained, for the purposes of his lumbering business, certain advances from the N. Bank, giving as security certain promissory notes, and as collateral security a written pledge of certain timber limits, whereby he purported to pledge the same to the bank, using merely the words, "I hereby pledge my rights to Licenses Nos. 470 and 471 to the N. Bank." During the next three years the bank made advances to F. In 1882, while F. was still indebted in a large sum and the pledge was in force, the N. Bank got the Crown Lands Department to issue licenses of the timber limits to them, as the regulations enabled it to do.

Held, that the pledge fell within the prohibition contained in 34 Vict. cap. 5 (D), sec. 40. The bank did not contract to advance any specified sum. They did not become bound to make any advance at all. It was not the case of a present advance on the security of the pledge, which was to be additional security, that is, additional to such securities as F. might give upon contemplated transactions between him and the bank in his lumbering business, as well as for advances which had theretofore been made. It could not be said that the advances were not made upon this security, although they were to be thereafter made in the course of a business between the bank and its customers, when no doubt other securities would be given at the time of making the advances. Hence the transaction could not be said to be one in which the lien was taken by the bank as additional security for debts "contracted" to the bank in the course of its business, so as to bring it within 34 Vict. cap. 5 (D), sec 41.

Held, however, that under the regulations of the Province of Quebec as to timber on Crown Lands, the transfer of the licenses to the defendants in 1882 gave the latter a complete ownership of them, and they having in

this action volunteered to say that they claimed only a lien upon them for the indebtedness of F., they were entitled to a right at least as great as a lien against the lands for such indebtedness.

T. S. Plumb, for the plaintiffs.
A. H. Marsh for the defendants.

[30TH APRIL, 1885.

In Re COULTER.

Married Women's Property Act, 1884—Married woman's right to convey without husband—Vendor and purchaser—Deficiency in land—Compensation.

Held, that a woman married before the Married Women's Property Act, 1883, may convey her property acquired before that Act without the concurrence of her husband.

The vendor sold land described as the east half &c., containing 100 acres more or less. A quarter of an acre was cut off one corner by a railway which was known to the purchaser when he made the contract.

Held, that he was not entitled to compensation.

This was an application under the Vendor and Purchaser Act, R. S. O. cap. 109, sec. 3.

The petition was presented by Ebenezer Smith, the purchaser, and set out that Joseph Holley by his will dated 14th April, 1874, devised the land in question to his daughter Mary Ann Johnston, for life, with remainder in fee to her children with one exception; that Mary Ann Johnston died about the year 1880, leaving her surviving Annie Coulter and four other children, her heirs and heiresses at-law, the youngest of whom came of age in the month of May, 1884; that before the death of the said Joseph Holley, one of the said children, Mary Jane Johnston, intermarried with one Caines, and the said Caines, in the year 1870, deserted his wife and had not since been heard of, and that it was impossible to obtain his signature.

By the conditions of sale, the property was described as "the east half of Lot 24, in the sixth concession of the Township of York, west of Yonge street, containing 100 acres more or less."

The petitioner was at the time of the purchase and for many years previous thereto, aware that the Toronto, Grey and Bruce Railway cut across the corner of the land, the petitioner having for many years occupied the adjoining farm, and the said late Joseph Holley, at the time of the sale of the right of way to the said railway company received therefor the sum of $31. The land occupied by the said right of way being about 26/100 of an acre.

The questions presented for decision were (1). Could the married woman, Mary J. Caines, convey her interest in the property without the

concurrence of her husband? (2). Was the petitioner entitled to compensation for the land taken by the said railway company?

W. M. Hall, for the purchaser.—The wife cannot make a valid conveyance without the concurrence of her husband under the Married Woman's Act of 1884. Sec. 2, which appears to give to married women ample power to deal with all kinds of property, is controlled by sections 3 and 5. Section 5 applies to women married before the commencement of the Act, who may thereunder convey as a *feme sole* property acquired after the passing of the Act: *Baynton* v. *Collins*, L. R. 27 Chy. Div. 604; *Re Thompson* v. *Curzon*, 12 W. N. 60; 45 and 46 Vict. cap. 75 (Imp.), Married Women's Act, 1882. Section 22 of the Act of 1884 repeals the Act of 1873 (R. S. O. cap. 127), so far as that Act restricted a married woman from conveying her real estate without her husband's consent; but the repeal does not affect the property of married women acquired before the passing of the Act of 1884, and the Act of 1873 is not repealed by section 22 of the Act of 1884, as to real estate acquired by a married woman before 1884.

As to the question of compensation for the land taken by the T. G. & B. Railway Company, the conditions of sale cover the whole of the east half of Lot 24, *i. e.*, the lot as originally surveyed, and the words "more or less" would not apply. The vendors should have specially excepted the part taken by the railway.

C. L Ferguson, for the vendors.—One of the most important incidents of separate estate is the right to convey without the concurrence of the husband. This incident is necessarily attached to separate estate, unless it is taken away by positive statutory enactment: *Adams* v. *Loomis*, 24 Gr. 342; R. S. O. cap. 127, sec. 3, rendered it necessary that the husband should join merely to show concurrence; his signature was only the performance of a manual act—a mere formality—he did not thereby part with any estate, interest or right in the lands of the wife; *Furniss* v. *Mitchell*, 3 App. R. 510; *Ingram* v. *Taylor*, 7 App. R. 216. Section 22 of the Act of 1884, repealing the latter part of the section 3 of cap. 127 of R. S. O., expressly does away with the necessity for the husband's signature; and the rights which married women possessed previous to its passing were very largely increased. This Act applies to all lands of a married woman whenever acquired, notwithstanding Section 5 of the Act.

It would be impossible for a married woman to enforce the rights given to her under sub-section 2 of Section 2, of the Act of 1884, or for another to enforce his rights against her, if the concurrence of the husband were still necessary.

The husband having abandoned his wife, and having been continuously absent and unheard of for more than fourteen years, must be presumed to be dead; *Best* on Evidence, 7th Ed. p. 375; *Best* on Presumption, p. 190.

The deficiency in the quantity being patent to the petitioner at the time of the purchase, the land having been sold *en bloc* and not by the acre.

there being no fraud or mis-representation, the amount of the deficiency being very trifling, and the land being described as "100 acres more or less;" the petitioner is not entitled to compensation: *Follis* v. *Porter*, 11 Gr. 442; *C. P. L. & S. Co.* v. *Young*, 18 Gr. 566; *Wardell* v. *Trenouth*, 24 Gr. 465; *Fry* on Specific Performance, 248 & 353-4; *Addison* on Contracts, 6th Ed. p. 88.

FERGUSON, J., 30th April, 1884, held that the married woman, Mrs. Caines, had power to convey the land in question without her husband joining, and that it should be so declared, and that the purchaser was bound to accept such a conveyance. He also held that the petitioner was not entitled to compensation. The parties having agreed that each should bear his own costs, no costs were given; but had it not been so agreed, the vendors would have been entitled to costs.

(Reported by C. L. Ferguson, Esquire, Barrister-at-law.)

[1ST MAY, 1885.

In re COOKE & DRIFFIL.

Will, construction of—Vesting—Gift over.

R. C. by his will bequeathed all his personal estate to his wife, M. S. C., to be held for the interest of his son, A. S. C., when he should have arrived at the age of 24 years; an annuity to his wife, M. S. C., for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources; such money to be used for the necessary expenses of education, etc., for the son; he desired that the wife should have control of all money coming to the son till he was of the age of 24 years, and at that time all rents and other property should come into his possession except the annuity; that at the death of the wife all rents and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns forever. In case of the death of the wife, before the son attained 24, another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, etc., were to be hers during her natural life, and after her death one-half to go to the testator's relations, and the balance to the relations of the wife; she making this disposition before her death; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death. In an application under the Vendor and Purchaser Act, R. S. O. cap. 109, for the opinion of the court, it was

Held, following *Gairdner* v. *Gairdner*, 1 Ont. R. 184, that, when a legatee or devisee is to have the absolute control of property at a specified time, a subsequent gift over must take effect, if at all, before the time specified, and the son here having attained the age of 24 years and come

into possession and control, the subsequent gift over cannot affect his estate or interest which has become absolute. If the lands passed by the will the son and the widow joining as grantors could convey such title as the testator had at the time of his death. If the lands did not pass by the will the son as heir-at-law and the widow as to dower could make a good title.

T. J. Robertson, for the vendors.

Masten, for the purchaser.

IN CHAMBERS.

[BOYD, C., 20TH APRIL, 1885.

MASSE v. MASSE.

Transferring action—Jury notice—Rule 545.

In an action for the recovery of land the writ of summons issued in the Chancery Division in regular course pursuant to Rule 545. A jury notice was served by the defendant. A motion was made by the plaintiff to strike out the jury notice, and a cross motion by the defendant to transfer the action to another Division.

Held, that the object of Rule 545 being to equalize the business in the three Divisions of the High Court, an action will not now be transferred from one division to another except on very strong grounds. It was impossible to say on the facts disclosed that this action would be better tried by a jury than by a Judge sitting alone, and the jury notice should therefore be struck out and the action retained in the Chancery Division. The decision in *Bank of British North America* v. *Eddy*, 9 P. R. 468, is affected to that extent by Rule 545.

J. C. Hamilton, for the plaintiff.

W. H. P. Clement, for the defendant.

[22ND APRIL, 1885.

WALKER v. WALKER.

Interim alimony—De facto marriage denied.

Upon an application for interim alimony, the plaintiff swore that she was married to the defendant, and gave the time, place, and circumstances

of the alleged marriage. The defendant denied, and brought confirmatory evidence to support his denial, that the marriage was celebrated at the time and in the manner and place alleged by the plaintiff, but he did not deny the existence of facts deposed to by the plaintiff from which a marriage de facto might be inferred. The defendant had himself at times called the plaintiff his wife and had conducted himself as if she were his wife. Interim alimony was granted by a Local Master.

Held, that the principle which underlies all the decisions is that the granting of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*. The Court exercises a discretion in granting or withholding alimony *pendente lite*, which is regulated by the circumstances of each case, and the defendant by his own act and conduct having clothed the plaintiff with the reputation of being his wife, the decision of the Local Master appealed from should not be interfered with.

Lash, *Q.C.*, for the appeal.

Hoyles, contra.

[16TH MARCH, 1885.

PETRIE v. GUELPH LUMBER CO.

STEWART v. THE SAME.

INGLIS v. THE SAME.

Costs—Taxation—Appeal—Cases printed and argued together—Defendants severing.

Appeal from the certificate of one of the taxing officers on the taxation of the costs of these actions in the Court of Appeal.

Quære, whether the appeal should not have been to a Judge of the Court of Appeal.

The defendants were the same in the three actions. The actions were actions of deceit brought against the defendants other than the company by persons who had been induced to subscribe for stock of the defendant company by untrue representations. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean which was the foundation of the actions was true.

Held, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants.

When the actions were in the Court of Appeal, Burton, J. A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together.

Held, that the taxing officer was right in allowing separate counsel fees in each case.

Creelman, for the plaintiffs.

Walter Barwick, for the defendant McLean.

R. S. Cassels, for the other defendants.

[20TH MARCH, 1885.

BRIGHAM v. WARNER.

Jury notice—Common law action.

In an action brought in the Chancery Division by a landlord against his tenant the statement of claim prayed for specific performance of a covenant to repair, or damages for breach of the covenant. A jury notice was served by the defendant.

Held, that the action was in effect a common law action, notwithstanding the frame of statement of claim for specific performance, and that the defendant was entitled to the benefit of his jury notice.

Cattanach, for the plaintiff.

Hoyles, for the defendant.

[ROSE, J., 13 APRIL, 1885.

COOK v. LEMIEUX.

Action for recovery of land—Judgment under Rule 322.

In an action for the recovery of land, the plaintiffs moved, under Rule 322, for final judgment upon the pleadings, the depositions of the defendant taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant. The defendant on his examination admitted that his father told him there was a lease from the plaintiffs, but he did not admit any of its terms. The lease put in and verified by affidavit was a lease from year to year, terminable at the end of any year on six months' notice, the lessees to pay all taxes and to keep the fences in repair. It was not alleged that any notice to quit had been given, or that anything undertaken by the lessees had not been performed. The defendant on his examination further admitted that he was in possession simply as his father's agent, that the title set up by his father was a title by possession, and that the only ground on which he expected to continue to hold was length of possession. The plaintiffs sought to show that the interest of

the lessees under the lease was at an end, by proving from the defendant's examination that his father had disclaimed the title under the plaintiffs, and by the defendant's statement of defence in which he denied the plaintiffs' title.

Held, that much care should be taken in such cases not to take away the right of trial on *viva voce* evidence, that the plaintiff's case was not conclusively made out, and that the motion, therefore, should not be granted.

Quære, whether the lease in question was a document which, under Rule 322, could be proved on this motion by an adverse affidavit without cross-examination.

A. H. Marsh, for the motion.

G. H. Watson, contra.

NORTH v. FISHER.

Security for costs—Amount—Rule 431.

The defendant having obtained on *præcipe* an order for security for costs, a Local Judge allowed the plaintiff to pay into Court $200 in satisfaction of the order. This amount was afterwards increased to $250, but the Local Judge refused to make an order for further security. An appeal from the order of the Local Judge was dismissed, as the $250 appeared to be sufficient.

Quære, whether there is any power to make an order enabling a plaintiff to pay into Court a less sum than $400, where the plaintiff has taken out a *præcipe* order under Rule 431.

Fitzgerald, for the appeal.

Holman, contra.

[14TH APRIL 1885.

THE UNION LOAN AND SAVINGS CO. v. BOOMER.

Reference under sec. 47—*Judicature Act—Jurisdiction of Master in Chambers —Rule* 323.

The Master in Chambers made an order under section 47 of the Judicature Act, referring to an official referee to enquire and report the

amount in which the defendant was indebted to the plaintiffs under the mortgage in question.

Held, on appeal, that the Master in Chambers has no jurisdiction so to refer an action, following *White* v. *Beemer*, 5 C. L. T. 182; but an order was made under Rule 323 for a reference as upon a substantive motion.

W. H. P Clement, for the appeal.

Shepley, contra.

[ROSE, J., 7TH APRIL, 1885.

BULL v. NORTH BRITISH CANADIAN INVESTMENT CO.

Amending statement of claim by changing place of trial—Rule 179.

The plaintiff, having in his statement of claim named Toronto as the place of trial, afterwards amended it on *praecipe* under Rule 179, by naming Belleville as the place of trial.

Held, on appeal, affirming the decision of the Master in Chambers, and following *Frietsch* v. *Winkler*, 3 Ch. Cham. Rep. 109 (decided under G. O. 81, which is substantially the same as Rule 179) that no change of the place of trial could be made by amendment of the statement of claim.

C. Millar, for the plaintiff.

Creelman and *Urquhart*, for the defendants.

BAKER v. JACKSON.

Examination of witness de bene esse—Ex parte order—Affidavit of information and belief.

In an action in the Common Pleas Division an *ex parte* order of a Local Judge for the examination of a witness *de bene esse*, on the ground that he was dangerously ill and not likely to recover, was affirmed on appeal.

Held, that the Chancery practice must be followed, and that by it the Local Judge had jurisdiction to make the order *ex parte*.

Semble, that an affidavit of the solicitor on information and belief that the witness was dangerously ill was sufficient.

The affidavit and the circumstance that the order was not acted upon for thirteen days after it was issued were regarded as unsatisfactory, and

limitations were imposed upon the use at the trial of the evidence taken under the order.

H. J. Scott, Q.C., for the appeal.

Holman, contra.

[10TH APRIL, 1885.

THE DAVIES B. & M. CO. v. SMITH.

Execution—Money paid to sheriff—Creditors Relief Act, 1880.

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario on the 6th December, 1884. The sheriff seized the defendants goods on the 8th December. The defendants made a mortgage of his goods to D. on the 9th December. B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee D. paid to the sheriff the whole amount of the first execution, $115, specially appropriating the payment to that execution and the sheriff in like manner received the money on that execution.

Held, that the money paid to the sheriff was not "levied" by him within the meaning of the Creditors Relief Act, 1880, and that the first execution creditor was entitled to the whole of it.

Holman, for the sheriff.

G. H. Watson, for the first execution creditor.

H. D. Sinclair, for the second execution creditor.

J. R. Roaf, for the claimant.

[THE MASTER IN CHAMBERS, 14TH APRIL, 1885.

ONTARIO BANK v. BURK.

Special endorsement—Judgment under Rules 14 and 80.

The plaintiffs specially endorsed their writ of summons under Rule 14 as follows:—"The plaintiffs claim is $1,702.72 for money lent by the plaintiffs to the defendant, the same being the amount due to the plaintiffs in respect of the defendants' overdrawn bank account with the plaintiffs branch or agency office at P., and interest thereon from the 1st day of December, 1884, until judgment."

Held, that it was insufficient on which to move for judgment under Rule 80, for that it should have stated the date at which the account was overdrawn to the amount specified.

Walter Barwick, for the plaintiffs.

G. H. Watson, for the defendant.

[8TH APRIL, 1885.

ROSENHEIM v. SILLIMAN.

Examination of witnesses before trial—Rule 285.

An order was made under Rule 285, on the application of the plaintiff, for the examination before the trial of the manager of the defendant's branch business at Toronto, and the clerk in the Toronto office who accepted in the defendant's name the bill of exchange sued on, where the defendant himself lived out of the jurisdiction.

Holman, for the plaintiff.

Ogden, for the defendant.

GRANT v. MIDDLETON.

Notice of trial—Irregularity.

A notice of trial in an action brought in the Queen's Bench or Common Pleas Division, given for a special sitting for the trial of actions in the Chancery Division, is irregular, and will be set aside.

Holman, for the defendant.

A. H. Meyers, for the plaintiff.

[21ST APRIL, 1885.

MACDONALD v. PIPER.

Solicitor and client—Action on bills of costs—Reference to taxation—Rule 443.

In an action by a solicitor against his client to recover the amount of a bill of costs rendered, the defendant disputed the retainer, and the plaintiff moved for an order referring all the questions in the action and the taxation of the bill to one of the taxing officers.

Held, that by Rule 443 and Form 136, the former practice has been changed, and an order referring a bill of costs to a taxing officer should not direct the officer to do more than ascertain the proper amount of it.

Held, also that, an action having been brought on the bill in question, it would not be proper to refer the question of liability which arises in the action to the decision of a taxing officer.

George Bell, for the motion.

Moffatt, contra.

[30TH APRIL, 1885.

DEMOREST v. MIDLAND RAILWAY CO.

Tender of money—Striking out defence—Judgment under Rule 322.

An action to recover money as compensation for land expropriated by the defendants and for other relief. The defendants in their defence denied the cause of action, and also alleged *inter alia* that they had tendered to the plaintiff the sum of $400 and interest, but that the plaintiff had refused to accept it, and they expressed their readiness to pay the said sum, but they did not bring it, or any sum, into Court with their defence. The plaintiff in his reply admitted the tender, but alleged that the sum tendered was wholly inadequate. Upon a motion by the plaintiff to strike out such portion of the defence as alleged a tender, or for judgment for the plaintiff for the amount which the defendants expressed their readiness to pay,

Held, that, since the Judicature Act, a defence of tender without a payment into Court is good. Upon the pleadings, an order might be made under Rule 322 for judgment for the plaintiff for $400 and interest, but only as a final decision of the action, and not with leave to proceed for a further amount.

Holman, for the plaintiff.

Hoyles, for the defendants.

THE

CANADIAN LAW TIMES.

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ONTARIO LEGISLATION, 1885.

GARNISHING *Debts*.—The Creditors' Relief Act, 1880, is amended by chapter 15 of the Acts of last Session, by making section 21, respecting garnishee proceedings, applicable to such proceedings in Division Courts. The Absconding Debtors Act, section 16, is also amended, by making money paid into Court under a garnishee summons subject to attachment by the Sheriff under a writ of attachment against an absconding debtor.

Notaries Public, Commissioners.—Notaries Public, by chapter 16, are to have all the powers of Commissioners for taking affidavits. There ought to be no doubt about the power of a notary to take an affidavit of execution of a deed for the purpose of registration; for the power to take such an affidavit is given both by section 8 of this Act and by section 3 of chapter 23 of the Acts of the same Session. Section 4 of chapter 16 makes every Notary Public an officer of the High Court, and of the Court of Appeal; and by section 5 any Notary who misconducts himself in respect of the powers conferred upon him by the Act shall be subject to the same penalty or punishment as a Commissioner would be; and any power conferred upon him may be revoked in the same way and to the same extent as if the power had been conferred upon him under any of the provisions of the Acts R. S. O. cap. 68 and 80, or 45 Vict. cap. 11, sec. 1. Chapter 80 of the Revised Statutes relates

to Commissioners to take recognizances of bail. The Judges may appoint Commissioners appointed under chapter 63, and others, to be Commissioners to take recognizances. Nothing is said in this Act as to revocation of the Commissions; but we presume that the Judges can exercise summary jurisdiction over their appointees. Chapter 63 provides for the appointment of Commissioners to take affidavits. By section 4, any of the Superior Courts (now the High Court) may revoke any commission issued by the Judges of any Court, and it shall operate as a revocation in all the Courts. The effect of this is that though a Commissioner may be appointed by the Judges, the commission must be revoked by "any of the Superior Courts." One Judge, therefore, sitting in Court has power to revoke a commission. The power of revocation under R. S. O. cap. 63, is not dependant upon any condition mentioned in the Act, but is left to the discretion of the Court. No penalty or punishment is mentioned in the Act, unless the revocation of a commission under section 4 can be so deemed; but Commissioners being under the summary jurisdiction of the Courts may be liable to other penalties than the revocation of their commissions. Notaries who misconduct themselves *as commissioners* are by the Act in review brought within the same jurisdiction. The additional clause giving power to revoke the Notary's powers as a Commissioner makes him subject to the jurisdiction of the Courts under section 4 of R. S. O cap. 63, if indeed he is not already brought under it by the prior part of the section. Some confusion may arise from the exercise of jurisdiction in this respect. There is no power to revoke the Notary's commission as a Notary, but only to revoke his powers as a Commissioner. The Court can only maim him, so to speak. He may still practise as a Notary. Under the Act in review, section 2, a Notary may take an affidavit in any part of Ontario.

Registry Act.—Some slight, though important, amendments are made to the Registry Act by chapter 28. A very important addition is made with reference to plans. By sub-section 3 of the new section 85 of R. S. O. cap. 111,

enacted by this Act, where lands in a township have been or may hereafter be sold under surveys or subdivisions so different from the Crown survey that they cannot be easily identified, and no map or plan has been registered, the township council may cause a plan to be made and registered and levy the expenses upon the land in question, and compel payment in the same manner as they may compel payment of taxes.

Assignments for Creditors.—Chapter 26 is entitled "An Act respecting assignments for the benefit of creditors." The preamble is as follows:—"Whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirous to remedy the same." We have excellent authority for saying that when a statute is ambiguous, and the mind is labouring to discover the design of the Legislature, it naturally seizes upon everything from which aid can be derived; and consequently the preamble, and sometimes even the title, have been looked at (*a*). We venture with confidence to enunciate on our own responsibility the converse proposition, viz., that when the title and preamble insufficiently indicate the design of the Legislature, we must look at the statute in order to ascertain it, and this safe rule we must follow in the case of this statute. Having perused it from end to end we cannot force ourselves to the conclusion that the desire expressed in the preamble will be fulfilled, if the Act ever becomes law. There is a very grave question to be determined before the Act will become beneficial, and that is as to its validity. There is no doubt whatever that many of the clauses of the Act, standing alone, are within the jurisdiction of the Legislature, just as many of the clauses of the Insolvent Act of 1875, taken alone, would have been *ultra vires* of the Parliament of Canada, and within the jurisdiction of the Provincial Legislatures. Viewing the whole enactment as one, however, it is unquestionably in its purpose an

(a) Maxwell on Statutes, 2nd Ed. pp. 50, 56, 57.

of Her Majesty's Superior Courts in England, Scotland or Ireland, not being Courts of merely local jurisdiction." Sub-section five provides for the call of Barristers of other Provinces in Canada "in which the same privilege would extended to Barristers from Ontario," and who produce evidence of call and testimonials of good character. This Act was passed to remove a doubt expressed by some of the Benchers whether the words which we have quoted from sub-section five extended also to sub-section three. Chapter thirty of the Act of last Session removes the doubt. The law before revision of the statutes was certainly as the amending Act now expresses it. It was section three of the Revised Statute that Mr. De Souza relied on as giving him a statutory right to practise at the Bar of Ontario, totally ignoring the plain words at the beginning of the section, "subject to any rules, etc., made by the Benchers." The question as to the right of any one who claimed, before the passing of this Act, to be admitted, is not affected by the Act.

Hawkers and Pedlars.—In *Regina* v. *Coutts* (*d*), it was held that a traveller for a tea-dealer, who carried samples with him from house to house, took orders for tea and forwarded them to his employers, and upon receipt of the goods delivered them to his customers, was not a hawker within the meaning of a by-law, passed under the Consolidated Municipal Act, 1883, sec. 495 (3), which prohibited hawkers, &c., from selling goods without a license. It was also held that a municipality could not pass a by-law prohibiting unlicensed traders from sending out agents for selling goods as the defendant in the case was sent. Chapter 40 of the Act of last session declares that the word "hawkers," in sub-section 3, of section 495 of the Consolidated Municipal Act, 1883, shall include all persons who, being agents for persons not resident within the county, sell or offer for sale, tea, dry goods, or jewellery, or carry and expose samples or patterns of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods. The ingenuity

(*d*) 5 Ont. R. 644.

of the dealer will be taxed to discover a loop hole through which he may still push his wares; and he has until the first of October next to think over it.

Lord's Day observance.—By R. S. O. cap. 189, section 1, the conveying of travellers is excepted from the prohibition contained in the section against the exercise of ordinary callings on the Lord's Day. In *Regina* v. *Daggett* (*e*), it was held that no distinction could be drawn between travellers on business and travellers on pleasure. Hence, Sunday excursions were not within the Act. Chapter 44 of the Acts of last session declares that Sunday excursions "having for their only, or principal object, the carriage of Sunday passengers for amusement or pleasure only, and to go and return on the same day by the same steamboat or railway, or any other owned by the same persons or company, shall be unlawful, and shall not be deemed a lawful conveying of travellers within the meaning of any statute, &c." It is not difficult to see how the words of this Act may be made of no effect.

Protection of Sheep.—A most important amendment to the R. S. O. cap. 194, the Act for the Protection of Sheep, is contained in chapter 46 of the Acts of last session. Section 16 of the Revised Statute gives an action to the owner by summary proceedings before a Justice for the damage done to his sheep by dogs, and he is thereunder entitled to recover, whether the owner of the dog knew or did not know that his dog was vicious and accustomed to worry sheep. Under this enactment the Police Magistrate of the town of Windsor lately had to deal with a case where sheep had been worried by a number of dogs belonging to different persons. The damage done was not disputed, but as no one could positively state what, or how much, damage had been done by any one dog, the question arose whether any of the owners of the dogs could be amerced. The magistrate held that the owners of those dogs which could be identified as having been of the number who worried the sheep were liable. Judge Horne quashed the conviction, holding that

(*e*) 1 Ont. R. 537.

the damage done by each dog should be charged to the owner of the dog, and that there was no joint liability. It can easily be seen that the Act would under that construction (which was the true one, no doubt), utterly fail in affording any protection to owners of sheep; for the worrying and destruction of sheep by mischievous dogs do not as a rule take place in daylight while reliable witnesses are looking on. The amending Act provides that the Court, Judge or Justice may, where the damage has been occasioned by several dogs, apportion the damages amongst the respective owners in such shares as he may think fit. Where the owners of some of the dogs are unknown, provision is made for arriving at an approximate estimate of the damage done by the dogs whose owners are known.

It will have been observed that in the case of nearly every Act to which we have referred, the reason of the enactment lies in some recent decision. That many of the enactments are most beneficial cannot be denied; but it is matter for serious consideration whether or not it is a safe and satisfactory policy to make such rapid changes in the law. We shall never be able to arrive at a knowledge of the law, if it is to be a matter of course that every session all unsatisfactory phases of the law appearing in the judicial decisions of the past year are to be made the subject of legislative enactment. The statutes are too hurriedly drawn, and are in many cases evidently the result of impulsive desires rather than of thoughtful deliberation. Instead of setting at rest doubtful questions, they in many cases only give rise to new and harassing doubts.

LEGISLATIVE INTERFERENCE WITH CONTRACT.

The mantle of the early chancellors appears (in some respects at least) to have fallen upon our modern legislators. Those ancient worthies, unfettered by rule or by precedent, dispensed chancellor's justice, each according to his own peculiar fancy, bound by no other restraint than what he was pleased to call his conscience (*a*). As they did not hesitate to evade or ignore Acts of Parliament, it was scarcely to be expected that they should pay much heed to contracts, even though executed in the most solemn form. They early evinced a disposition to make for suitors such judicially constructed contracts as their lordships deemed prudent men should have made, rather than to interpret and enforce the contracts in question, as they actually found them. The lingering remains of such a disposition have cropped up at times, even within the memory of living men. The modern judicial tendency, however, is against any such interference with the freedom of contract, and one of the greatest of the modern exponents of equity merely expresses the present disposition of the judges, when he says, "I have always thought, and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability, and at arms' length—that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention, on the ground that judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character" (*b*).

(*a*) See *Spence's* Equitable Jurisdiction of the Court of Chancery, Vol. 1, Book 2, chapters 1 and 2.

(*b*) Per Jessel, M.R., *Wallis* v. *Smith*, 21 Chy. Div. 266.

In the same case Cotton, L. J., says: "I must say that I quite agree with the Master of the Rolls that the sounder view to take is this, to leave people who are competent and under no disability to make their own contracts and then to act on those contracts whatever the true interpretation might be, without assuming on behalf of the Courts, either of Law or Equity, to say, 'This is unreasonable and we will make another and different contract between the parties. They did not mean what they have said in their contracts.'"

The same great Judge whose opinion we have first quoted, further says, "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract. Now there is no doubt that public policy may say that a contract to commit a crime or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money, or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are not other cases to which it does apply, but I should be sorry to extend it much further" (c).

Herbert Spencer in the *Contemporary Review* for February of last year treats at length of the itching tendency exhibited by the modern Legislatures to intermeddle with the freedom of contract between subject and subject, and he terms it "The New Toryism." Are all the offenders in this respect hereafter to be known as Tories? If so, there

(c) *Printing and Numerical Registering Company* v. *Sampson*, L.R. 19 Eq. 465.

is an immediate necessity for drawing over again the party lines in the Province of Ontario. Our present Government arrogates to itself the name of Liberal.

On examining the early history of any of the existing systems of law, we shall find that contracts were at first of but small importance, as compared with that which they have since attained. Numerous restrictions were imposed which limited their use and operation; and their substance, that is, the expressed intention of the parties, was made subservient to the matter of form and ceremony. At the same time we shall find that the mutual relations between individuals were, in great measure, governed by rights and duties inalienably attached to those individuals and springing from their status. Thus we find that masters and slaves, landlords and tenants, &c., had attached to their respective positions certain rights and duties which they could by contract neither modify nor remove. As the various systems have developed and adapted themselves to the requirements of a commercial people, this state of affairs has gradually become less marked, and the tendency in every progressive system of law has ever been towards an extension of the contractual capacity, with increased freedom of contract, and the subjection of form to the intentions of the parties (*d*).

Professor Maine expresses this idea by saying that the movement of the progressive societies has hitherto been a movement *from status to contract*.

This being so, is not the legislation in many of our Acts of a retrogressive character? We have seen that Jessel, M. R., repudiates the idea that the judges know the business of the people better than the people know it themselves. Are our legislators better informed than the judiciary in this respect?

A. H. MARSH.

(d) See *Maine's* Ancient Law, cap. 9.

WHAT CONSTITUTES REGISTRATION.

The duties of a Registrar in registering an instrument are thus defined by Harrison, C.J., in *Lawrie* v. *Rathbun* (*a*): "1. Enter the instrument in the registry book in the order in which it is received. 2. File the same with the affidavit of execution. 3. Endorse a certificate on the instrument. 4. Mention in the certificate the certain year, month, day, hour, and minute, in which such instrument is *entered and registered*, expressing also in what book the same has been entered and the number of the registration. These duties are of two classes: Those that relate to the registry, and those which are to follow registration, and are designed to evidence it. The first two requisites which I have mentioned strictly relate to the former class of duties, and are paramount; the three last, to the latter class of duties, and are subordinate. In addition to these last-mentioned duties there are duties of a still more subordinate character mentioned in the Act. Among these latter I class the duty to keep an alphabetical (*b*) index and make entries therein. The object of the index is plain. It presupposes registration, and is designed to facilitate reference to the registration. It would be trifling with common sense to hold that the omission of such a duty avoids the registration." And again, "If the instrument be received by the registrar and entered in the register book and filed in the office it is to be deemed registered, although there may be some defect in the affidavit or other proof for registry. * * So I think, on the same principle, the instrument must be deemed registered, although the Registrar or his deputy afterwards omit to index it in the alphabetical index" (*c*).

(*a*) 38 U. C. R. at p. 261.

(*b*) The point in issue was whether the Registrar's omission of the instrument from the *abstract* index postponed the instrument. The reference to the *alphabetical* index is apparently an error in reporting.

(*c*) *Lawrie* v. *Rathbun*, 38 U. C. R. at p. 262.

The remarks of the learned Chief Justice are confined to the provisions of section 59 of the Registry Act, in which are detailed the duties of the Registrar "upon production to him of the original instrument." There are other sections of the Act, however, which have an important bearing upon the question.

Section 55 declares that "All instruments that may be registered under this Act shall be registered at full length, including every certificate and affidavit, excepting certificates by the Registrar, accompanying the same, *upon and by* the delivery to the Registrar of the original instrument, when but one is executed, or when such instrument is in two or more original parts, upon and by delivery of one of such parts."

Section 59 directs the Registrar to enter the instrument in the book in the order in which it is received, to file the same with an affidavit of execution, and to endorse thereon a certificate, in which shall be mentioned the year, month, day, hour and minute, in which such instrument is *entered and registered*, and which shall also express in what book the instrument *has been entered*, and the number of registration.

Section 33 requires the Registrar to keep an abstract index book in which every instrument registered shall be entered "in addition to all entries by law required."

Adopting the obvious division of the Registrar's duties into those which pertain to registry, and those which are designed to evidence it, we must make a further division of the first class into those which are essential to complete registration, and those which are not essential, but for omission or breach of which an action will lie. The question is thus narrowed down to the consideration of whether delivery to the Registrar is sufficient, or something additional is to be done by the Registrar before registration is complete.

Under the sub-heading, "How various instruments are to be registered," we find that Crown Grants are to be registered by producing to the Registrar the grant or an exemplification with a sworn copy; and the copy is to be

filled (*d*). Orders in Council are to be registered by the deposit of a certified copy of the order (*e*). "Every will shall be registered at full length by the production of the original will and the deposit of a copy, etc." (*f*). Municipal by-laws may be registered; and "for the purpose of registration a duplicate original of such by-law shall be made out, certified under the hand of the clerk and the seal of the municipality, and shall be registered without any further proof" (*g*). "All instruments, other than grants from the Crown and wills, shall be registered by the deposit of the original instrument, or by the deposit of a duplicate or other original part thereof with all the necessary affidavits" (*h*). If the question depended upon these sections of the Act, it might reasonably be argued that the deposit of the instrument was sufficient, and that upon the deposit the party registering would be entitled to evidence of registry. Whatever may be the true interpretation of these clauses, it is certain that in practice Crown Grants are never, while wills are always, entered in full in the books. Yet both stand in the same position under the words of the Act. But little reliance can be placed upon these clauses in striving for a solution of the question, for they in fact refer to the *preparation* for registry of various peculiar instruments, of which the originals cannot be parted with, and of which duplicate originals are never made. Other duties than the mere receipt of these documents are to be performed by the Registrar, and we must still look to the other and more general clauses to ascertain whether the performance of these duties is essential to complete registration.

Section 55 is the only section of the Act which approaches a definition of registration, but it is most ambiguous. The terms "entered" and "registered" are used as if they were synonymous; and the expression "upon and by" is misleading. If, instead of using the expression "upon and by," the word "upon" had alone been used, the section would have been directory, merely requiring the

(*d*) Sec. 61. (*e*) Sec. 62. (*f*) Sec. 63.
(*g*) Sec. 73. (*h*) Sec. 64.

Registrar to register, *i.e.*, transcribe or enter, the instrument at full length when produced, omitting his own certificate. The use of the expression "upon and by the delivery to the Registrar" imports that, when the act of delivery is complete, thereupon and thereby registration is effected. But this construction cannot with certainty be placed on the clause, inasmuch as it declares that the instrument shall be registered "at full length, including every certificate and affidavit, excepting certificates by the Registrar, accompanying the same," which clearly imports transcribing or entering the instrument at full length in the book upon delivery, excepting the Registrar's certificate.

If we reject altogether the signification of the word "by" in this clause, we have left a mere direction to the Registrar to enter the instrument at full length. Section 56 requires him to certify the registration. These directions are repeated in section 59, and some additional duties are required, by the same section, to be performed. Section 33, as we have seen, directs the Registrar to enter in the abstract index the particulars of the instrument and its registration, "in addition to all entries by law required." All the duties required by sections 33, 55, 56 and 59, stand upon the same footing. As far as the words of the Statute are concerned one is as important as another. The classification of these duties into those that relate to registry and those that are designed to evidence it, is one that is so obvious that it forces itself upon us; and we are thereby enabled to reject, as not being essential to registration, those acts which are merely intended to evidence it. But this classification leaves all the duties relative to registry, *i.e.*, entry at full length, filing and indexing, classed together as duties of equal importance and essential to registration, or else it is left to judicial discretion to determine which are essential and which are not.

According to Harrison, C. J., the entry at full length and filing are absolutely necessary. The duty of entering the particulars in the abstract index is said not to be essential, for it presupposes registration. That is not, however, we

venture to say, an inevitable rendering of the Act. Section 33, which requires entry in the abstract index, does not presuppose either filing or entry at full length, unless they are included in the signification of the word "registration" as used in that clause. But we cannot concede that point when the very question for determination is the meaning of the word "registration." In order that the Registrar may make the entries required by section 33, two things must have been determined, viz., the registration number of the instrument and the date of its registration. It is a plausible argument to say that this presupposes registration. But it is quite consistent with the hypothesis that the entry in the abstract index is an essential part of registration. If indeed it were the only duty required of the Registrar, the clause would be quite intelligible. The duties of the Registrar cannot all be performed literally *upon* production to him of the instrument, as section 59 words it. That section directs that he shall *upon* production of the instrument indorse on it the day, hour, and minute in which the instrument *was entered* and registered, and also in what book the same *has been entered.* This clause cannot be literally satisfied. For the entry at full length and filing of the instrument take place some time after the delivery of the instrument to the Registrar. In order, therefore, to give full effect to this group of clauses we must resort to the fiction that all the duties of the Registrar are supposed to be performed simultaneously as soon as he has received the instrument.

Upon the literal interpretation of section 59, the Registrar cannot endorse the certificate of registration upon the instrument until after it has been transcribed at full length in the proper book for entry; because he has to indicate the book in which it has been entered, and the "certain year, month, day, hour and minute in which such instrument is entered and registered." The entry and registry are here spoken of as one act. The form of the certificate prescribed in this section provides for the insertion of but one date *i. e.*, the actual minute of the day of the entry and registration. No reference, it will be observed, is made to

the filing of the instrument ; the entry is deemed to be the matter to be particularly certified. The Registrar can therefore give a true certificate without actually filing the instrument, and the certificate presupposes that registration is complete. If the minute of the entry is to be fixed when the copyist begins to transcribe the instrument, the filing (by which is meant, we suppose, the depositing of the instrument in a place prepared for it) cannot take place until after entry in the book; nor can the instrument be filed simultaneously with the completion of the entry in the book, as a matter of physical possibility, if we take that minute as the minute of registration. Again, we are forced to say, this clause cannot be literally satisfied. And we think we may venture to say that the duty of filing the instrument said by Harrison, C. J., to be paramount, *i.e.* essential, might be found not to be absolutely necessary in order to perfect registration.

It is to be observed that the only intelligent construction of section 55 is in favour of the view that the party delivering an instrument to the Registrar for registration is entitled thereupon to evidence of registry. It imports that the Registrar may give his certificate of registration before entry in the books ; for the direction to enter the instrument at full length expressly excepts *his own certificate*, which must, therefore, have been given by him on receipt of the instrument.

We have seen that as the duties of the Registrar are to be performed at different times, *i.e.*, as the receipt, entry at full length, indexing, and filing of the instrument must of necessity be performed at successive intervals of time, the actual minute of registration cannot be determined if these acts are all essential to registration, unless we resort to the fiction that they are all supposed to be performed simultaneously upon receipt of the instrument. The minute in which he receives the instrument would on this hypothesis be the minute which the Registrar must certify as the time of registration.

If on the other hand we look upon delivery to the Registrar as sufficient to complete registration, so as to

entitle the party registering to evidence of registration, the minute in which the delivery takes place, is the minute which is to be certified on the instrument.

It is not a matter of purely theoretical interest to ascertain the precise time at which registration is complete; it is a matter of practical, and sometimes of vital, importance. And a consideration of the clauses of the Act grouped under the sub-heading, "Effect of registering or omitting to register," will show that there exist strong arguments in favour of the view that registration is complete, in so far as the party offering an instrument for registration is concerned, as soon as he has delivered the instrument to the Registrar.

By section 75, all wills are to be registered within the space of twelve months next after the death of the testator, or within the same period of time after the removal of any impediment to registration; otherwise the will shall not be valid as against subsequent purchasers or mortgagees. If a will were delivered to the Registrar on the last day of the twelve months, but were not entered at full length and filed until the next day, could a purchaser for value from the heir, who had previously registered without notice of the will, claim that it had not been registered within the twelve months. If entry at full length and filing are absolutely essential to registration there would be a great deal to be said in his favour. And even if the Registrar, anticipating the book in which the will would necessarily be entered, were to give his certificate of registration as of the time of delivery, it would still be open to the purchaser to show that the registration actually took place at a later date. For the Registrar's certificate is only *prima facie* evidence, and may be shown to be untrue (*i*).

So with regard to Treasurers' deeds for taxes, and Sheriffs' deeds of lands sold under process, provided for by section 76.

By section 80, "Priority of registration shall prevail unless before such prior registration there has been actual

(*i*) R. S. O. cap. 111, secs. 56, 59; *Doe d. McLean* v. *Manahan*, 1 U. C. R. 491.

notice of the prior instrument by the party claiming under the prior registration." The effect of this section was considered in *Millar* v. *Smith* (*j*), where Gwynne, J., said, "To give literal effect to this clause would be to deprive a purchaser for valuable consideration *without any notice* whatever of the prior instrument before he got his deed and paid his purchase money, if actual notice of such prior instrument should be brought home to him in the interval between his getting his deed and putting it on registry." The Court held this to be the inevitable construction of the Act. Notice, then, becomes effectual if brought home to the subsequent purchaser at any time before *registration* of his conveyance. If registration is complete only upon the entry at full length and filing of the instrument, a purchaser without notice may be deprived of the benefit of his deed upon receiving notice at any time after delivery of the instrument to the Registrar and before entry at full length and filing, by the production to him of a prior secret conveyance. And it is evident that the Registrar's certificate endorsed upon his conveyance will be no protection to him, if in fact the instrument has not actually been transcribed in the books and filed. So, entry in the books without filing, or filing without entry in the books, would be sufficient to destroy completely the effect of the Registrar's certificate of registration if these duties are both essential to complete registration.

On the other hand, it may well be argued that a person searching the registry and finding no original instrument filed in the proper place, and no entry at full length in the books, is completely protected by purchasing and registering his conveyance, notwithstanding that a prior purchaser holds a conveyance endorsed by the Registrar with a certificate of registration. And so it was held in *Doe d. McLean* v. *Manahan* (*k*), decided under the Act, 35 Geo. III. cap. 5, sec. 5. There is no direction in this Act as to the manner in which registration was to be effected; but the Registrar was to endorse a certificate on the deed of the day, etc., on

(*j*) 28 C. P. 47, 57.
(*k*) 1 U. C. R. 491.

which the memorial was entered and registered, expressing also in what book it was entered. In this case there was no entry in the books, and no memorial was filed in the office, but a marginal note was found in one of the books giving the number of the deed, day and hour of registration and pages of the book in which it was certified to have been registered. It was held that there was no registration, and that a subsequent registered deed took priority. Both grantees were perfectly innocent. The Court refused to regard the certificate of registration as conclusive, declaring that to do so would be to determine that all persons held "their estates at the mercy of the Registrar, who could give effect to deeds at his pleasure by giving false certificates of registry never made." While trying to avoid this result the Court in effect actually attained it when they arrived at the decision which was given; for the prior grantee had done all that he could do by delivering his conveyance to the Registrar, and demanding and receiving evidence of registration. Under this decision a purchaser is completely at the mercy of the Registrar, and holds his estate by a precarious tenure indeed. The Registrar has power by delay or neglect, very trifling it may be, to postpone indefinitely, the period of time within which a purchaser may be affected by notice; and he has power, by omitting to transcribe the instrument or to file it, to make it fraudulent and void as against a subsequent instrument which he does transcribe and file (*l*). And apparently there is no power to relieve except as against the registrar, for it is enacted that priority of registration shall prevail except in cases of actual notice.

As a matter of practice registration is always considered complete when the instrument has been received by the Registrar. It is the universal practice amongst conveyancers, having regard to the fact that a purchaser is affected by notice at any time before registration, not to pay over purchase money until after delivery of the instrument to the Registrar; but after such delivery payment is consi-

(*l*) R. S. O. cap. 111, sec. 74.

dered to be safe. It is also a universal practice for the Registrar to certify the registration as having taken place at the moment when the instrument was received for registration. The particularity of the Act in requiring him to certify the very minute in which the instrument is registered points to an instantaneous, or brief, act on the part of some one; and the entry and filing, as we have seen, are successive acts, not to be performed in a minute. Again, the diligence of the parties is of no avail if the Registrar by the internal regulations of his office can settle priorities between parties. Priority is intended by the Act to be determined by the delivery to the Registrar, and he is to enter the instruments in the order in which they are received by him. But if he does not do so, are the priorities altered?

EDITORIAL REVIEW.

A Fool for His Client.

The adage that the man who is his own lawyer has a fool for his client was never more strikingly exemplified than in the case noted ante, p. 136, where a member of the English Bar demanded audience in our Courts without having been first called to our Bar. His conduct while pressing his suit was, for a Barrister, so exceptional, that we passed over the whole event with a mere reference to the point of law involved. But the applicant, having got himself beyond the limits of the Province, on his way to England we believe, fires a parting shot in the columns of the *Legal News* (8 L. N. 146), and his letter so grossly misrepresents the actual facts that we deem it a duty to the Bench and Bar of this Province to correct the impression that might be conveyed by the appearance of the letter in so reputable a journal as the *Legal News*.

The occasion of the letter is said to be the "unfairness of most of the reports of the case in the Ontario press." If being let very much alone by the press was unfair treatment, the gentleman in question certainly has reason to complain. For, beyond a statement of his argument in the *Canada Law Journal*, and faithful reports of what took place in Court by the two leading daily newspapers, we believe no notice was taken of him. The statement in the *Canada Law Journal* was of course written or approved by a Barrister, and the reports in the daily newspapers were written, the one by a Barrister, the other by a student-at-law, and two of them are cited with approval in the letter. No conceivable reason could be given for untrue reports of the case.

The facts, as narrated in his letter, are, in substance, as follows:—That his application to the Benchers for call to the

Bar being refused, on account, as he says, of a rule having been passed excluding English Barristers from practising in this Province, he determined to disregard the Law Society and proceed upon his absolute right. He then states that he applied three times to the Court of Appeal. On the first occasion he was refused a hearing. On the second, he says, "the judges grew intemperate, ordered me to sit down, asked me if I *called myself a gentleman*, and threatened to turn me out." On the third occasion, after he had been asked if he was a member of the Law Society, he answered that he was not, but his right depended on a statute. This issue he says the judges declined to try, and threatened him with violence. His duty did not suffer him to obey their commands, and the sheriff was ordered to remove him.

The actual facts are as follows:—He applied to the Benchers for admission to the Society, but was told that he must, in accordance with the rules, be proposed by a Bencher, and that his name must be posted for three months. This is a rule which applies to all alike. No student can be called to the Bar without this notice; and it would be strange indeed if members of the English, Irish, Scotch, and colonial Bars enjoyed privileges which our own students do not enjoy. He declined to submit to this, and immediately demanded audience in the Common Pleas Division by rising to make a motion. The Court directed him to notify the Law Society, which was done. His right of audience was fully argued on the return of the motion. Judgment was reserved and finally delivered in the ordinary course, determining that he had no statutory right to be heard, but that he must first be called to the Bar by the Law Society and submit himself to the rules of that body. In the meantime, Convocation had considered his claim, and had previously arrived at the same conclusion. These important facts, and especially the decision of the Common Pleas Division, are almost completely ignored in the letter in question; the merest reference being made to a "decision of a lower Court." And his letter certainly would not convey to one unacquainted with the facts, the important fact

that he had been accorded a fair hearing in a Court of his own choosing, and that after due deliberation that Court had decided against him.

It was after his refusal to comply with the rules of the Society, and after the decision in the Common Pleas Division, that he appeared daily in the Court of Appeal demanding audience. He either could not, or would not, see that though the Court of Appeal was not bound by the decision of the Common Pleas Division on the point of law, yet that he, the applicant, was bound by the judgment of the Common Pleas Division on his right, as long as he allowed it to remain on record without appealing from it. If it was not the subject of appeal, as he seemed to think, he had himself to thank for it.

The courteous and patient manner in which the Court of Appeal declined to hear him and bore with his interruptions from day to day, was in striking contrast with his gross impertinence to the Court on the last occasion on which he appeared there; and it was only after an appeal to him as a gentleman to desist from interrupting the Court, and a refusal on his part to accede, that the Court was obliged to direct the sheriff to remove him. Fortunately, force did not become necessary.

His assertion that the Benchers offered privately to make an exception to the rules in his case, which offer he declined, is without the slightest foundation; and his base insinuation that the Judges of the Court of Appeal and the Benchers conspired against him, is beneath contempt.

Manitoba Exemptions.

A statute was passed at the late Session of the Manitoba Legislature which would surprise any one who was not accustomed to watch the course of legislation in Canada.

Its provisions are, in substance, as follows:—The following real and personal property are declared exempt from seizure under writs of execution, namely, the debtor's bed, bedding and household effects not exceeding in value $500; his necessary and ordinary clothing and that of his family; twelve volumes of books, the books of a professional

man, one axe, one saw, one gun, six traps, his nets; necessary food for himself and his family for sixty days, if in his possession at the time of seizure; two cows, three oxen, or three horses or mules, if the horses are used by the debtor in earning his living; four sheep, two pigs, twelve fowl, and food for the same for sixty days; the tools, etc., used by the debtor in his trade, etc., to the value of $500; the articles and furniture necessary to the performance of religious services; not more than one hundred and sixty acres of land (outside a town or city) resided on or cultivated, either wholly or in part, by the debtor, with the house, stables, barns and fences; all the necessary seeds for seeding and cultivating thirty acres; the residence of any person other than a farmer in any city or town or municipality not exceeding $2,500 in value. If the residence exceeds $2,500 in value the creditor must pay or secure to the debtor $2,500 before selling the house, and that sum, or any security in which it may thereafter be invested shall be exempt from seizure under execution, or attachment for debt. The debtor may choose out of the articles exempt from seizure those he will retain if he possesses more than the quantity exempt.

The Legislature must be composed entirely of judgment debtors who have endeavoured to make Manitoba a haven of rest for themselves.

The net result of the Act is that, if the debtor is a professional man, he may own a house worth $2,500; furniture, $500; clothing, household supplies, etc., say, $500; library, at least $1,000; two cows, say, $80; total, $4,580. If he is not a professional man, he may, instead of a library, own tools, etc., worth $500; making the total, say, $4,080.

If, in addition to his profession, he has a taste for farming, and cultivates a farm, and spends the profits in living, he may also own 160 acres, worth, say, $1,600; farm house, say, $500; barn, $400; stable, $300; seeds, and food for horses and cattle, say, $100; agricultural implements, $500; horses, sheep, pigs and fowl, say, $300; total, $3,700. Add this to what he owns in town, and the grand total is $8,280. We have omitted from this calcu-

lation the value of the "articles and furniture necessary to the performance of religious services," because we assume that any one who desires to take the benefit of the Act will be found either not to possess them, or quite ready to relinquish them.

We doubt very much if one quarter of the working population of Manitoba have $4,000 each clear of incumbrances. The Act therefore practically amounts to a declaration that no debt shall be recovered by process.

We take it that, as a matter of course, the Act will be disallowed. It outrages every principle of justice; it paralyzes every creditor and deprives him of the fruits of his judgment; and, if allowed to remain in force, it would not only have the effect of turning the trade of Canada away from Manitoba, but also of discrediting Canada in other countries. The pity is that the Legislature should have power to impair the obligations into which men enter with each other. Occasionally a cry goes up that our constitution does not work well and that it should be amended. The amendment most to be desired, is one that would compel all the legislative bodies to respect the sanctity of contracts.

There is no doubt of the power to disallow this, or any Provincial Act; and it is not necessary that the Governor-General should give reasons for its disallowance. He has power, technically, to disallow a Provincial supply bill. But reasons are plentiful enough if it were necessary to state them.

Mr. Cooley and the Elective System.

It is the unexpected that happens. Mr. Justice Cooley, one of the best known of American lawyers, and one of the most eminent American text writers, has been rejected by the electors on offering himself for re-election to the Supreme Court Bench of the State of Michigan. With Kent, Story, Wharton, Bishop and Dillon, Mr. Cooley has enjoyed the honour of being cited beyond the limits of his own country as a jurist. He is, or was, a lecturer in the Law School of the University of Michigan, and he is

one of the Editors of the *American Law Register*, one of the ablest of the American magazines. "And yet," says the *Central Law Journal*, "this great lawyer, after having occupied for some twenty continuous years a seat upon the Supreme Bench of this State, was defeated of re-election the other day by a political combination, having at the head of their ticket a man unknown to the legal profession outside of Michigan. We don't wish to say anything in disparagement of him, for we know nothing of him. He may be a good lawyer and may make an excellent judge. But that the people of Michigan should have been willing to put aside a lawyer of the pre-eminent learning, experience and probity of Mr. Justice Cooley for a new and untried man, is a striking illustration of the impolicy of electing judges by the popular vote."

Following the announcement comes a letter to the same journal charging Mr. Cooley with having been in the pay of a railway pool as a permanent arbitrator. The charge is made by a gentleman who frequently appears as a contributor in the American law periodicals, and is evidently a man to whose opinion some deference must be paid. This charge is denounced as untrue by a professor in the University of Michigan, and the reporter of the Supreme Court of Michigan; but it is not disputed that Mr. Cooley did act in isolated cases as an arbitrator. It is evident from this little controversy that the facts are not agreed upon; that the case against Mr. Cooley was one of suspicion only; that even in the hands of his own profession, those who ought to have known best how to vote, the ballot was not absolutely safe. How then could the electors at large vote intelligently and justly upon the question? Elections the world over are worked by the politicians. Strong combinations are invariably made and worked in elections, and they are not always made in the interests of virtue and merit. Before we can believe that the electors of Michigan are more innocently virtuous than Mr. Cooley, we want some very convincing evidence.

Dalhousie Law School.

The second annual session of this School closed on the 29th April, having an attendance of fifty-eight students.

The degree of LL. B. was conferred on the following gentlemen:—A. W. Bennett; H. W. C. Boak; W. S. Doull; M. W. Lenoir; W. B. Ives; P. C. C. Mooney; C. Morse; J. A. Sedgewick; W. B. Wallace; A. Whitman.

The following gentlemen are the University prizemen:—*Third Year.*—W. B. Ives; H. W. C. Boak. *Second Year.*—S. R. Thompson; W. D. Carter; Joseph A. Chisholm; A. E. Milliken. *First Year.*—H. Mellish; F. A. McCully; F. W. Hanright; W. K. Thomson.

Mr. David Dudley Field was present at the closing exercises and read a paper on the comparative jurisprudence of the English-speaking peoples. The true ideal of a lawyer he thus pourtrays:—"One who is master of the laws of his country, and a student of other laws, as they may serve to elucidate or improve his own; a faithful adviser, a fearless defender, prompt to make use of his learning and opportunities, not only for the protection of his own client, but for the improvement of the laws themselves wherever he finds them the instruments of injustice. Fidelity to his client and to the Court is a duty on which we need not dwell, for it is constantly asserted and never denied. But the duty to improve the system under which he lives and practises, wherever capable of improvement, is not so generally insisted upon and believed. It is supposed to be enough for a lawyer to know the laws of his own country, advise his clients aright, and deal fairly with the Courts. But this is not enough. The laws themselves are not seldom imperfect or unjust, and whenever they are so, I insist upon the duty of those who know them best, and know best how to improve them, to make their knowledge available for the public good. Now, the moment that the duty is admitted, it becomes us to seek the best means of performing it. These means are in part our own study and experience, and in part the example of others. Hence the importance of comparative jurisprudence."

Law Reform.

In his address to the Faculty of Law at Dalhousie University, Mr. Field advocated, of course, the adoption of a Code, and greater simplicity and uniformity in laws. As one means of simplifying the law, he proposed the abolition of all distinction between sealed and unsealed writings. "A piece of paper is brought to a land owner in one of our States, which purports to be a conveyance of land; the owner puts his name to it and makes no sign with his pen after the name; the paper is now worthless; but if he makes a scrawl or scratch after his name the paper conveys away his estate. What folly!" Mr. Field is just a little wrong in his Equity here.

The devolution of land upon the personal representative of a deceased person was also mentioned by him as one of the necessary reforms. The chief reason given for this change is the facility with which title can be made. In cases of intestacy the conveyancer would thus avoid the necessity of procuring all the necessary proofs of heirship. The letters of administration would sufficiently designate the person entitled to convey. But facility in making title means facility in disposing of the land; and though this may be eminently satisfactory to a purchaser, and perhaps to the vendor, the latter is but a trustee, and his power in this respect would be apt to cause uneasiness amongst his *cestuis que trustent*.

Law Students and the N. W. Rebellion.

The following resolutions were unanimously passed by Convocation at its first meeting after the Volunteer Militia were ordered out to suppress the Rebellion in the North-West Territories:—

"That an order be made by Convocation that all members of the Society who had given notice of their intention to present themselves for call or for admission during the present term, and who have been prevented from so doing by reason of absence upon military service in the North-

West, be called to the Bar or admitted, as the case may be, without further examination and without payment of fees, upon complying with the other rules of the Society."

"That all students-at-law and articled clerks who are on active military service, shall be allowed the time during which they have been or may be absent from their offices; and also any examinations which may intervene, and for which they might have presented themselves while on such service."

Setting Down Actions in Chancery Division.

The following direction was given to the Clerk of Records and Writs several months ago, but, as it has not become generally known to practitioners, we now publish it:—

"The Clerk of Records and Writs is required in future to see that all preliminary proceedings are regular before setting a cause down and to classify motions for judgment into undefended and defended ones.

Solicitors will therefore require in setting down cases for judgment for default of appearance or pleading

1. To file with the Clerk of Records and Writs the writ of summons, affidavit of service of writ and statement of claim, affidavit of non-appearance or no defence, and proof of the allowance of the service of the writ when that is necessary under Rule 45.

2. To state in the *præcipe* whether it is undefended or defended, or partly defended and partly undefended."

REVIEW OF EXCHANGES.

Albany Law Journal.—25th April, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. *Rule.* Where a witness refuses to answer a question on any of the grounds mentioned in the preceding rules, the Court is bound by his refusal, unless, the grounds of his privilege being before him, the Judge can see that the witness is mistaken concerning his liability as a matter of law.

Ibid.—2nd May, 1885,

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. *Rule.* The objection, within the foregoing rules, is personal to the witness, and cannot be availed of by another, nor can another than the witness complain that his privilege has been improperly denied. But otherwise where it has been improperly allowed. Where a witness testifies voluntarily to one circumstance in a criminating transaction, he must answer all enquiries concerning the same transaction, but not as to other and unconnected criminating matters.

Ibid.—9th May, 1885.

Lost Wills, by CHARLES Z. LINCOLN. Concluded in the following number. What is required to be shown in evidence before such wills can be established, is stated, and reference made to New York cases.

Ibid.—16th May, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. *Rule.* The risk of prosecution, to avail the witness as an excuse for refusing to answer a question, must be to himself, and must be a reasonable one in the ordinary course of justice; and the matter must be criminating and punishable in the country of the former, and by its laws, unless it clearly appears from the evidence that such will be the effect likewise in a foreign state or country.

Lost Wills, by CHARLES Z. LINCOLN. If a will, shown since to have existed, cannot be found after the death of the testator, the presumption is that he destroyed it *animo revocandi*, yet this presumption may be rebutted by evidence, as by the declarations of the testator, showing the continued existence of the will down to near the time of his death. Such declarations are held admissible in evidence both in the United States and in England. In proving the contents of a will the gradations in the evidence may be stated as follows: (i) The best evidence is the original will itself. (ii) In case of its loss, an authenticated copy is the best evidence. (iii) Witnesses may have read the original. (iv) Witnesses may have heard it read. (v) The testator may have made declarations as to its contents.

American Law Register.—February, 1885.

Reformation in Equity of Contract void under the Statute of Frauds, by H. CAMPBELL BLACK. Where it is sought in equity to reconstruct an instrument of writing which upon its face is void under the Statute of Frauds, as not fulfilling the requirements of the statute, the jurisdiction of the Court to relieve against the consequences of fraud, accident or mistake is apparently brought in conflict with the provisions of the statute. The article treats of cases where equity will withdraw such instrument from the operation of the statute, reform it upon parol evidence and decree its specific performance. The leading American cases upon the point are discussed, and are divided into two classes, viz., (I) Where the written agreement, as it stands, includes more in its subject-matter than was originally intended by the parties, and where the relief demanded is the rescission of the agreement as to this extraneous matter, and its specific performance upon lines conforming to the real agreement of the parties; and, (II) where the written agreement, as it stands, is too narrow—where it does not embody all the elements of the original contract, whether as to subject-matter or other provisions. Cases of the first class can hardly be said to materially conflict with the statute, as no new contract is made, though one is narrowed. In the second class of cases there is a conflict of authorities, and the learned writer contents himself with pointing this out, without attempting to reconcile them.

Ibid.—March, 1885.

Constitutional Regulations of Legislative Proceedings, by J. R. BERRYMAN. There are no restrictions upon the Parliament of Great Britain as to the mode of its procedure, and there is no such thing known to English law as the unconstitutional enactment of a statute. There can be no enquiry as to the regularity of an enactment; the enrolled Act is a verity. On the other hand, rules prescribing forms for the guidance of legislatures in the United States are incorporated in many of the state constitutions. These rules vary in the scope of their requirements, and are expressed in varying terms. In many cases constitutional regulations of the forms of procedure are said to be mandatory upon legislative bodies; but after action the presumption is that they have been observed, and the Court will not go back of the enrolled Act to impeach it. But this rule is not uniformly adhered to, and it has been held that there is no difference between declaring a law unconstitutional for matters patent upon its face, though passed regularly, and a law apparently good, yet passed in violation of rules imposed by the constitution for the protection of the rights and liberties of the citizen. This is the generally received American doctrine. Constitutional requirements of various states in reference to giving notice of intention to apply for a law, the use of a prescribed form of enacting words, several readings of the bill, the reading of amendments, the vote required to pass, necessary signatures of presiding officers, etc., are treated of separately.

Ibid.—April, 1885.

Validity of Contracts in Restraint of Trade, by EUGENE MCQUILLIN. Concluded in the following number. The origin of the doctrines

of law upon this subject is said to be found in the early English law of apprenticeship. The learned writer gives extracts from the opinions expressed by the Judges in the oldest reported cases, and proceeds to show how the old rule that all contracts in restraint of trade, however limited in their operation, were void, was relaxed with the extension of commerce; and quotes recent opinions of American Judges who appear to go the length of doubting whether the reasons upon which the rule is found are applicable to the circumstances of a new country at all. Notwithstanding such opinions, the binding force of the rule is not doubted, and modifications in it are attributed to the different views entertained by modern Judges, as to what is a restraint of trade. Where the operation of the contract is general, the latter is unenforceable. There is a contrariety of opinion as to whether the interests of the parties should be taken into account in determining the validity of these contracts, or whether public interest is alone to be considered.

Ibid.—May, 1885.

Validity of Contracts in Restraint of Trade, by EUGENE MCQUILLIN. Exceptions to the rule as to general restraints are given, and the subject of partial restraints then considered. A large number of cases are cited.

Law Journal, 14*th March*, 1885.

Beer v. Foakes. Comments upon this case, which is reported in 54 L. J. Rep. Q. B. 130. "It must now be considered undoubted law, only to be altered by Act of Parliament, that a debtor cannot gain a discharge from his debt by paying a lesser sum unless there is some additional consideration, even though the creditor accept, or agree to accept it in full discharge." Inconsiderate legislation upon the subject, based upon expressions of disapproval of this ancient doctrine by the English Judges, is deprecated, though it is suggested that an alteration might be beneficially made by permitting the release of a debt, or part of a debt, by any writing, and not by deed only. In this Province, the doctrine is abolished by legislation of this year.

Injunction or Damages. Remarks upon *Holland* v. *Worley*, 54 L. J. Rep. Chan. 268.

Ibid.—24th March, 1885.

Privilege in Relation to Criminal Issues. How far may a solicitor be compelled to disclose communications made to him by a client in a criminal case or upon the trial of an issue involving a crime? Communications made in furtherance of a criminal object are not protected by privilege except when that object is the successful defence of the accused before the Court which tried him, and the communication is made after the event.

Ibid.—11th April, 1885.

Lord Cairns. A short sketch of the professional career of the late Lord Chancellor.

THE

CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

WEST NORTHUMBERLAND ELECTION CASE.

Appeal—Wager by agent with voter—Bribery—Corrupt practice.

The charge upon which this appeal was decided was known as the Pringle-Parker case. Pringle, the president of the Conservative Association, made a bet of $5 with one Parker, a liberal, that he would vote against the conservative party, and deposited with a stakeholder the $5, which after the election was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and Parker said he had formed the resolution not to vote before he made his bet, but the evidence shewed that he did not think lightly of the sum which he was to receive in the event of his not voting, his answer to one question put to him being: "Oh! I don't know that $5 would be an insult to any person not to vote."

Held, (reversing the judgment of the Court below) that the bet in question was colourable bribery within the enactments of sub-sec. 1 of sec. 92, of the Dominion Elections Act, 1884, and a corrupt practice which avoided the election.

J. K. Kerr, Q.C., and *MacLaren*, for the appellants.

D. McCarthy, Q. C., for the respondent.

O'SULLIVAN v. HARTY.

Appeal to Supreme Court—Time for appealing—Supreme Court Act, sec. 25—Security under sec. 31, as amended by sec. 14 of the Supreme Court Amendment Act, 1879.

Judgment was pronounced in the Court of Appeal of Ontario on the 30th June, 1884. Vacation begins in that Court on the 1st July, and ends on the 1st September. On 13th September, the respondent (the appeal having been allowed) deposited $500 as security for the costs of an appeal to the Supreme Court of Canada, and applied for leave to appeal. The Court of Appeal were of opinion that the security, not having been deposited within 30 days of the pronouncing of the judgment, was given too late, as the vacation did not interrupt the running of the time allowed by the statute, Supreme Court Act, sec. 25, for appealing. The judgment of the Court of Appeal was not entered until 14th Nov. 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the Judges, and subsequently before the full Court, before being finally determined. On 27th November, 1884, the respondent in the Court of Appeal applied to a Judge of the Supreme Court of Canada in Chambers, for leave to give security under sec. 31 of the Supreme Court Act, as amended by sec. 14 of the Supreme Court Amendment Act, 1879. This application was referred to the full Court which

Held, that the time for bringing the appeal in this case under sec. 25 of the Supreme Court Act began to run from the 14th November, 1884, the date of entry of the judgment of the Court of Appeal; that where any substantial matter remains to be determined before the judgment can be entered, the time for appealing runs from the entry of the judgment; where nothing remains to be settled, as for instance in the case of the simple dismissal of an action, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

In appeals coming from the Province of Quebec, the time for appealing runs in every case from the pronouncing of the judgment, owing to the peculiar form of procedure in that province.

O'Sullivan, for the appellant.

Whiting, for the respondent.

QUEBEC.]

CITY OF MONTREAL v. HALL.

Malicious prosecution of civil suit—Damages—Arts. 2262, 2267, C. C.—Prescription.

On the 7th July, 1868, the council of the city of Montreal passed a resolution authorising and directing proceedings to be instituted for the purpose of staying all proceedings of certain commissioners appointed

under 27 & 28 Vict. cap. 66 (by which proceedings they had determined the price or compensation to be allowed to one W. for expropriating certain property in the city of Montreal), and of having the said commissioners (the plaintiff being one of said commissioners) removed as persons who had forfeited their obligation as such commissioners. A petition was then presented to one of the Judges of the Superior Court of the Province of Quebec, by the corporation of the city of Montreal, wherein certain charges of venality and corruption were made against the plaintiff, and they prayed for the removal from office of the plaintiff as commissioner. By a judgment of the Superior Court, dated 17th Sept. 1870, the plaintiff was acquitted of the calumnious charges, but he was removed from office for another cause, which on appeal was pronounced by the Court of Appeal, and subsequently by the Privy Council to have been insufficient and unfounded. The plaintiff in May, 1871, instituted an action against the corporation, setting forth the above facts and alleging that the proceedings in the Courts had been instituted maliciously and without probable cause, and alleging that the effect of so falsely and maliciously prosecuting such proceedings was to deprive the plaintiff almost wholly of the benefit of his profession by branding him as venal and corrupt and unworthy of all trust and confidence, and claimed $20,000 damages. To this action the appellants pleaded *inter alia* that the action was for libel and barred by Arts. 2262 and 2267, C. C., and that no action would lie against them under the circumstances.

Held, affirming the judgment of the Court below, Fournier, J., dissenting, that the declaration disclosed a cause of action for malicious prosecution in that legal proceedings of a civil nature had been instituted maliciously and without probable cause, and as the proceedings were only terminated upon the delivery of the judgment of the Superior Court on the 17th September, 1870, whereby the plaintiff was acquitted of the calumnious charges made, the prescription did not begin to run before the date of the judgment, and the action was not barred by Arts. 2262 and 2267, C. C.

Held, also, that there was sufficient evidence of malice and want of probable cause to justify the damages awarded to respondent by the Court below.

Roy, Q.C., for the appellants.
Barnard, Q.C., for the respondent.

NOVA SCOTIA.]

MERCHANTS BANK v. GILLESPIE.

Winding up Company—45 Vict. cap. 23 (D)—Foreign company.

The Steel Company of Canada (limited), incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in Nova Scotia, and having its principal place of business at

Londonderry, Nova Scotia, was, by order of a Judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 Vict. cap. 23 (D). The appellants, creditors of the Steel Company, intervened, and objected to the granting of the winding up order on the ground that 45 Vict. cap. 23 was not applicable to the company.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Fournier, J., dissenting, that 45 Vict. cap. 23, was not applicable to such company.

Per Strong, J. This being a company having its domicile in England, and being subject to an express statutory provision for its winding up in the appropriate forum for such a purpose, *i. e.*, the forum of its domicile, a colonial statute providing for the winding up of the same company would be *ultra vires* and void, not merely upon the interpretation of the clauses as to the general powers of the Dominion Parliament in the British North America Act, but by the express provision of a paramount law, 28 & 29 Vict. cap. 63 (Imp.).

Henry, Q.C., for the appellants.
Laflamme, Q.C., and *Sedgewick, Q.C.*, for respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [17TH APRIL, 1885.

BEATTY v. THE NORTH-WEST TRANSPORTATION CO.

Company—Sale by director to company—Ratification by shareholders.

J. H. B., one of the defendants, a director of the defendant company personally owned a vessel "The United Empire," valued by him at $150,000; and was possessed of the majority of the shares of the company, some of which he assigned to others of the defendants in such numbers as qualified them for the position of directors of the company, the duties of which they discharged. Upon a proposed sale and purchase by the company of the vessel "The United Empire," the directors (in-

cluding J. H. B.) at their board meeting adopted a resolution allowing of the purchase by the company; and subsequently at a general meeting of the shareholders, including those to whom J. H. B. had transferred portions of the stock, a like resolution was passed, the plaintiff alone dissenting.

Held, reversing the judgment of the Court below, 4 C. L. T. 85, that, although the purchase on the resolution of the directors alone might have been avoided, the resolution of the shareholders validated the transaction, and that there was no principle of equity to prevent J. H. B. in such a case from exercising his rights as a shareholder as fully as other members of the company.

Robinson Q.C., and *J. H. Macdonald*, for the appellant.
Maclennan, Q.C., and *A. H. Marsh*, for the respondent.

PROUDFOOT, J.] [3RD MARCH, 1885.

BRUSSELS v. RONALD.

Municipal aid to manufacturers—Mortgage on real estate—Security under Municipal Act—Damages—Ultra vires.

Held, affirming the judgment of the Court below, 2 C. L. T. 309, on the facts there stated, that the plaintiffs were entitled only to an enquiry as to damages for the amount for which they would have a lien on the defendant's estate under the mortgage given by him to them.

Held, also, affirming the judgment, that the plaintiffs were not entitled to any relief on the second mortgage.

Robinson, Q.C., and *Bain, Q.C.*, for the appellant.
A. Bruce, for the respondent.

MOOREHOUSE v. BOSTWICK.

Partnership—Dissolution—Assignment of assets to continuing partner—Joint and separate creditors.

L. A. M. made an assignment of all his property to the defendant in trust to convert the same into money, and out of the proceeds to pay and satisfy all his debts and liabilities rateably and proportionately, without preference, and "recognizing such liens, claims, charges and priorities as the law directs." Some of the creditors were creditors of L. A. M. alone, whilst others were creditors jointly of him and his brother, with whom he had for some time previously carried on business, and who had assigned to L. A. M. all his interest in the plaintiff's effects, L. A. M. covenanting to pay all the partnership debts.

Held, reversing the judgment of the Court below, 5 Ont. R. 104; 4 C. L. T. 87, that in respect of such portion of the assets as had been the joint property of the partners the partnership creditors had a claim to be paid in priority to the separate creditors of L. A. M.

J. H. Macdonald, for the appellant.

Moss, Q.C., and *F. E. Hodgins*, for the respondent.

[17TH APRIL, 1885.

ARMSTRONG v. FARR.

Equitable assignment.

The defendant purchased land in which the plaintiff had some interest, and which he refused to release until assured that part of the purchase money to be paid by the defendant to his vendor would be handed to one H., a solicitor acting in the matter, out of which the amount due the plaintiff was to be paid, whereupon the plaintiff executed a conveyance of his interest, which was duly registered. The defendant and his vendor made other arrangements, and the defendant obtained a deed of the property.

Held, Burton, J.A., dissenting, affirming the judgment of the Court below, that an equitable assignment had been made of so much of the purchase money as was due to the plaintiff, and that the defendant was bound to pay the amount to the plaintiff.

Black, for the appellant.

Moss. Q.C., for the respondent.

[12TH MAY, 1885.

PAWSON v. MERCHANTS BANK.

Equalizing business—Rule 545—Transferring causes—Right to jury—Exclusive jurisdiction of Chancery.

Held, that Rule 545 was not intended to interfere with the power of transferring actions from one Division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions; nor is that its effect upon its true construction.

Held, also, that it does not amend, modify or repeal section 45 of the Judicature Act.

Held, also, that the exclusive jurisdiction of the Court of Chancery in Rule 45 means its jurisdiction as exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction.

This action was brought on behalf of the plaintiff and other creditors to set aside an alleged fraudulent transfer of notes, etc., made to the

defendants by the debtor, and for an injunction to restrain the defendants from negotiating them. The defendants served a jury notice, which Proudfoot, J., struck out.

Held, that this was such an action as would, before the Judicature Act, have been within the exclusive jurisdiction of the Court of Chancery, and therefore it fell within Rule 45, and should be tried without a jury.

The practice as laid down in *Bank of B. N. A.* v. *Eddy*, 9 P. R. 468, is still the proper practice.

The question whether the order of Proudfoot, J., was appealable was not determined as the appeal was dismissed.

Robinson, Q.C., *Hoyles* and *Wallace Nesbitt*, for the appellants.
Shepley, for the respondent.

[17TH MAY, 1885.

WANSLEY v. SMALLWOOD.

Appeal for costs—Disclaimer—Practice.

J., one of the defendants, had bid for and become the purchaser of a lot of land sold under the provisions of the R. S. O. cap. 216, by certain parties claiming to be trustees of the Coloured Wesleyan Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer disclaimed "all interest in the result of this suit, and no effort has been made by him to have said sale carried out as he was aware that the same would have to be first confirmed by the members of the said church." At the trial judgment was given setting aside the sale and ordering the defendants generally to pay costs.

Held, reversing the judgment of the Court below, that, under the circumstances, a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, although the action in the Court below was dismissed as against him without costs.

Richards, Q.C., for the appellant.
Walter Read, for the respondent.

FERGUSON, J.] [17TH APRIL, 1885.

COTTINGHAM v. COTTINGHAM.

Sale of lands—Sale by auction—Excess in quantity

The judgment of the Court below, 5 Ont. R. 704; 4 C. L. T. 207, was reversed on appeal, the Court being of opinion, Patterson, J.A., dissenting,

that the sum of $3100 was bid for the premises offered for sale and stated to be 100 acres, more or less.

Per Burton, J.A. The price per acre was only a mode of arriving at the sum bid, assuming the lot to contain 100 acres.

Moss, Q.C., and *Hopkins*, for the appellant.
S. H. Blake, Q.C., and *Hudspeth*, Q.C., for the respondent.

CAREY v. THE CITY OF TORONTO.

Sale of lots by a plan—Lane—Closing up lane.

The mere fact of the owner of lands selling them by a plan shewing streets and lanes thereon does not bind him to continue such streets and lanes, unless a purchaser is materially inconvenienced by closing them.

A sale by auction was announced of lots, the advertisement stating that "lanes run in rear of the several lots." At the auction the plaintiff purchased a lot on the north side of Baldwin street, which extended to a lane running from east to west, and a lane also ran in rear of other lots which joined at right angles the lane in rear of the plaintiff's lot.

Held, that as the plaintiff had ready access to the streets by the lane on which his lot abutted, he could not prevent the vendor from closing up any other lane upon the property.

Robinson, Q.C., and *Moss*, Q.C., for the appellant.
S. H. Blake, Q.C., and *Caswell*, for the respondent.

Rose, J.]

COSGRAVE v. STARRS.

Principal and surety—Guarantee—Effect of death of one of the partners to whom a guaranty is given—Notice to determine guaranty.

The judgment in this action, 5 Ont. R. 189; 4 C. L. T. 147, was varied on appeal by limiting the liability of the defendant under his guaranty to C. and Co. to what was due by Q. on the 5th April, 1882, when notice to discontinue supplying him with goods was given to C. and Co. by the guarantor.

Osler, Q.C., and *E. H. E. Eddis*, for the appellant.
Moss, Q.C., and *Aylesworth*, for the respondent.

BUTTERWORTH v. SHANNON.

Principal and agent—Purchase of land by agent—Ratification.

The plaintiff paid $1000 to the defendant for the purpose of investing the same in Manitoba lands for the plaintiff in case the defendant thought it advisable; if not, the money to be returned. The defendant did not act upon such authority, but purchased ten lots in Portage La Prairie. Two of these lots defendant alleged he purchased for the plaintiff, but there was no evidence of this other than the defendant's own statement, the conveyance of the ten lots having been taken in the defendant's name. The plaintiff subsequently agreed to take these two lots upon the representation of the defendant that they equalled the other lots in size, etc. which proved to be incorrect.

Held, affirming the judgment of the Court below, that the adoption of the purchase by the plaintiff having been made by reason of the defendant's misrepresentations as to size and value of the lots, the plaintiff was not bound thereby and was entitled to recover back the amount so entrusted to the defendant.

S. H. Blake, Q.C., and *J. K. Kerr, Q.C.*, for the appellant.
Moss, Q.C., for the respondent.

C. C. LINCOLN.]

TOWERS v. THE DOMINION IRON COMPANY.

Sale by sample—Right to reject goods.

The defendants bought by sample from W., who acted as a broker between them and the plaintiff, a quantity of cotton droppings or waste, to be delivered *f. o. b.* at St. Catharines, and, by the directions of the defendants, the same were forwarded to their branch house at Cincinnati, where it was alleged they were found to be not equal to sample. In the meantime, however, the defendants had accepted a bill drawn on them by the plaintiff for the price of the waste.

Held, affirming the judgment of the Court below, that the proper place to have inspected the goods was at St. Catharines, and that even if the goods were not up to sample it formed no ground of defence to the action on the bill.

Semble, per Hagarty, C.J.O. The defendants' only remedy was by cross action.

Allan Cassells, for the appellant.
Osler, Q.C., and *Towers*, for the respondent.

IN CHAMBERS.

OSLER, J.A.] [19TH DECEMBER, 1884.

EXCHANGE BANK v. BARNES.

Security for costs—Case in Court of Appeal.

The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and there moved to compel the plaintiffs to give security for costs on the ground that the latter resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in, and had withdrawn their assets from, this Province.

Under these circumstances the motion for security was refused.

R. Martin, Q.C., for the motion.

Laidlaw, contra.

High Court of Justice.

CHANCERY DIVISION.

[BOYD, C., 11TH MAY, 1885.

MITCHELL v. GORMLEY.

Partnership—Syndicate—Right of one partner to deal with his share—Profits.

M. and G. met and agreed to jointly purchase 150 acres of land and to sell it in lots or *en bloc* to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had a one-third interest, and G. had a two-thirds interest. No syndicate was formed to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and then he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing and recited that G. was seized in fee of the lands and had executed a declaration of trust of one-third in favour of M., and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G. and a declaration of trust as to one-third in favour of M. was signed by G. In an action by M. for a share of G.'s profit, it was

Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so that they had passed out of the partnership, though as to them there might be a sub-partnership; there had been no dealing with the joint property of the partnership, but only with the individual interest of one partner; he had sold some portion of his individual share, and no injury had resulted to his partner; and even *if* any had, it would be no more than one of the inevitable concomitants of the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed with costs.

McCarthy, Q.C., and *C. H. Ritchie*, for the plaintiff.

S. H Blake, Q.C., for the defendant.

RICHARD v. STILLWELL.

Guarantee, form of—How sent and received—Names of parties.

C. A. E. carried on business under the name of the S. P. Co., became indebted to the plaintiffs, and sold out to the defendant. The defendant then ordered goods from the plaintiffs, which were supplied, and at the same time a demand was made for an acknowledgment of C. A. E.'s indebtedness to the plaintiffs. The defendant subsequently gave a further order for goods, but the plaintiffs declined to supply them until the acknowledgment was forthcoming. Soon afterwards the plaintiffs received in an envelope addressed to their firm an acknowledgment in these words:—

"Lake Superior, Ont.
"July 4th, 1883.

"Gentlemen,—

I beg to inform you that I have assumed all liabilities of the S. P. Co., lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882.

"Respectfully yours,
"(Sd.) C. J. S.

"Kindly ship cases immediately."

The envelope was lost, but its receipt, superscription and subsequent loss were proved.

Held, that the plaintiffs were entitled to recover from the defendant the price of the goods sold to C. A. E.

W. M. Hall, for the plaintiffs.

G. H. Watson, for the defendant.

IN CHAMBERS.

[BOYD, C., 26TH MAY, 1885.

PAWSON v. THE MERCHANTS BANK.

Production of documents—Privilege.

The plaintiffs were allowed to read, upon a motion for a better affidavit of documents, an examination of the assistant general manager of the defendants, the Merchants Bank, taken for use upon an injunction motion.

G. was general solicitor for the defendants, the Merchants Bank, and was also acting in the transactions in question for other parties, and had himself agreed to endorse certain notes which were in question, and was negotiating actively much of the whole transaction.

Held, that letters written by G. to the Merchants Bank with reference to the transactions in question were not privileged from production.

Moss, Q.C., and *Hoyles*, for the Merchants Bank.

Shepley, for the plaintiffs.

[FERGUSON, J., 30TH MARCH, 1885.

In re HINDS; HINDS v. HINDS.

Lunatic, not so found—Support and maintenance—Money in Court.

Holman, for one Beaty Hinds, moved on petition for an order for payment out of Court to the petitioner from time to time of the moneys to which Charles Hinds was entitled, for the support and maintenance of the said Charles Hinds, who, as it appeared from the affidavits and papers filed, was a lunatic, though not so found, and was living with the petitioner, his brother.

John Hoskin, Q.C., official guardian for the lunatic.

FERGUSON, J. Is there any authority for such an order where the party has not been declared to be a lunatic?

Holman cited *Re Bligh*, 12 Chy. Div. 365; *Re Brandon*, 13 Chy. Div. 773.

FERGUSON, J., made an order for payment to the petitioner of the lunatic's share of the moneys in Court, of the costs of the application, and of an annual allowance to be expended for the maintenance of the lunatic.

[13TH MAY, 1885.

COTTINGHAM v. COTTINGHAM.

Infant plaintiffs—Next friend—Appeal to Supreme Court of Canada—Indemnity against costs.

Where the judgment of the Court of Appeal was adverse to the infant plaintiffs, and their next friend was desirous of appealing to the Supreme Court of Canada, and was advised by counsel so to do, and where it appeared that one of the Judges in the Court of Appeal had dissented from the judgment of the Court, an order was made to indemnify the next friend out of the infants' money in Court in respect of the costs of the appeal.

G. H Watson, for the next friend.

HERRING v. BROOKS.

Action in Chancery Division—Jury notice—Transferring action.

In an action for the price of goods sold and delivered which was begun in the Chancery Division, the defendants' jury notice, which had been struck out by the order of the Master in Chambers, was on appeal restored, and the action was transferred to the Queen's Bench Division. *Masse* v. *Masse*, ante p. 179, not followed, owing to the views expressed in the Court of Appeal in *Pawson* v. *The Merchants Bank*, ante, p. 279.

G. H. Watson, for the appeal.
W. A. Reeve, contra.

[ROSE, J., 4TH MAY, 1885.

SMITH v. SMITH.

Notice of appeal—Effect of.

A notice of appeal to the Court of Appeal is not an initiation of the appeal, and therefore, where a notice was given but was not followed up by the appellant giving security as required by section 38 of the Judicature Act,

Held, that there was no appeal pending, and a motion to set aside the notice of appeal or to dismiss the appeal was refused.

F. W. Hill, for the motion.

R. A. Porteous, contra.

[19TH MAY, 1885.

CARTER v. BARKER.

Dismissing action—Want of prosecution.

The pleadings were closed six weeks before the commencement of the assizes, but the plaintiff's solicitors did not serve notice of trial in time for such assizes, because they were waiting to hear from the plaintiff, whom they had notified that they would not proceed unless certain costs were paid. On the last day for serving notice of trial, about eight o'clock in the evening (service after four not being good), the plaintiff's solicitors asked the defendant's solicitor to accept service of notice of trial, but the latter declined to do so, and afterwards moved to dismiss the action for want of prosecution.

Held, that if the plaintiff without good excuse neglect to proceed with the action, the Court will not as of course on his mere undertaking to speed the action and paying costs refuse to dismiss, but under the circumstances above set out an order of the Master in Chambers refusing to dismiss and permitting the plaintiff to proceed was affirmed on appeal.

Aylesworth, for the appeal.

R. A. Porteous, contra.

ROSENHEIM v. SILLIMAN.

Examination of witnesses before trial—Rule 285.

The decision of the Master in Chambers, ante p. 178, was reversed on appeal as to the examination before the trial of the clerk who accepted the draft sued on in the defendant's name.

Ogden, for the appeal.

Holman, contra.

[22ND MAY, 1885.

ROBERTS v. LUCAS.

Dismissing action for want of prosecution—Rule 255—No bar to subsequent action.

An appeal from the order of the Local Judge at Hamilton in Chambers made under Rule 255 dismissing the action for want of prosecution, and refusing to insert in the order a clause reserving leave to the plaintiff to bring a fresh action was dismissed.

Held, that the order was not a dismissal on the merits, and not a bar to a subsequent action for the same cause.

Holman, for the appeal.
A. Bruce, contra.

[THE MASTER IN CHAMBERS, 27TH MAY, 1885.

McCALLUM v. McCALLUM.

Interlocutory judgment—Irregularity—Claim for injunction and damages.

Where the indorsement on the Writ of Summons claimed, in addition to pecuniary damages, an injunction restraining the defendant from disposing of certain goods, interlocutory judgment signed by the plaintiff for default of appearance was set aside as irregular.

Holman, for the motion.
Hoyles, contra.

THE

CANADIAN LAW TIMES.

VOL. V. JULY, 1885. No. 7.

CREDITORS' REMEDIES AGAINST COMPANIES APART FROM THE PROVISIONS OF THE WINDING UP ACTS (a).

I.—IN EQUITY.

UNTIL the passage of the Acts for the Winding up of Companies, the creditors of corporations usually found great, and frequently found insuperable, difficulties in collecting their claims in cases where the corporation debtor had no tangible assets exigible in execution. It is true that the Courts of Equity have frequently acted upon the principle that all the assets of a corporation, whether they be legal or equitable, are pledged as security for the claims of creditors. Debts due the company are equitable assets and may be reached by creditors through the aid of a Court of Equity, which will, in an action against the company, appoint a receiver by way of equitable execution against the company for the purpose of collecting the assets of the company and distributing them under the direction of the Court. And upon the same principle it follows that the liability of the shareholders of a corporation upon their stock subscriptions may be enforced at the suit of creditors, through the medium of a receiver, whenever the ordinary and tangible assets of the company are insufficient to satisfy creditors' claims. The stock subscriptions of the

(a) Being extracts from lectures delivered before the Students of the Law School at Osgoode Hall during the session of 1884-85.

members of a corporation are as much a part of the capital of the company as sums already paid in; and together with all other property and rights belonging to the company, having a saleable value, constitute the assets of the corporation and are pledged for the payment of its debts (*b*).

Even though it be expressly provided by the charter of a company that the shareholders shall be liable to pay their stock subscriptions in instalments when called upon by the board of directors, the latter cannot by refusing to make a call deprive the creditors of their remedy. The liability of the shareholders to contribute their shares of the capital of the corporation is an absolute one, and the corporation is authorised to pledge this liability as security for creditors. The directors are merely invested by the company with a discretion with regard to the time of requiring the payment of the capital subscribed for use in the company's business (*c*).

The right of a receiver appointed in a creditor's action to sue stockholders for unpaid subscriptions is discussed in 29 Alb. L. J. 365.

The earliest case in our Courts in which this principle that the assets of a company form a trust fund for creditors was enforced for the benefit of creditors, was *Harris* v. *The Dry Dock Company* (*d*). This was a suit brought in Chancery by a person who was both a shareholder and a creditor of the defendant corporation, and was brought by him on behalf of himself and all other creditors of the corporation, alleging that he had recovered judgment against the company in the Court of Queen's Bench, and issued execution therefor which was returned *nulla bona*, and that although the directors admitted that sufficient was due upon the unpaid but subscribed shares to satisfy the debts of the company, they refused to take any steps to enforce payment of the amount due upon said shares. The prayer of the Bill was for an account of the stock subscribed for, and what amount remained due thereon, and that the

(*b*) Morawetz, sec. 575. See *Sawyer* v. *Hoag*, 17 Wall. 610.
(*c*) Morawetz, sec. 577.
(*d*) 7 Gr. 450.

defendants might be ordered to collect and get in such an amount thereof as would pay the debts and liabilities of the company. The president and directors were made co-defendants along with the company, but it was held that they were improper parties. Chancellor Blake in giving judgment says: "The Bill proceeds upon the principle that the capital stock of such companies constitutes a trust fund for the payment of their debts, amongst other objects, and that the directors who are trustees of the powers reposed in them by the Act of Incorporation, may be compelled to use those powers for the benefit of creditors who have a material interest in the execution of the trusts; and that view of the plaintiff's case appears to me to be consonant to reason and consistent with the authorities." V. C. Esten concurred in this view, and after citing *Salmon* v. *The Hamburg Company* (*e*), says: "This case is a clear authority that where a corporate body having power to create property, and incurring debts upon the faith of an honest exercise of it, especially when they have no tangible property, may be compelled by decree of this Court, to create the property which they are enabled to produce, and that the exercise of this power and obedience to its dictates may be enforced against the members of the governing body, and individual members of the corporation, respectively in their private capacity, by process of contempt." His Lordship further indicated that if necessary a mandamus would be granted to compel the directors to make calls upon the stock and collect them in, and His Lordship further adds, "It seems clear, judging from the cases that have been cited, that the plaintiff has a right to file this bill against the corporation and is entitled to a decree that calls shall be made and their payment enforced and his debt paid; and that the governing body will be liable in their individual capacity to process of contempt in case of default to perform the decree, and the members of the corporation will be similarly liable in case the calls are not paid within the time limited."

In *Phillips* v. *The Royal Niagara Hotel Co.* (*f*), this case is referred to with apparent approval, and the learned judge

(*e*) Ca. Ch. 240. (*f*) 25 Gr. 361.

intimates that the principle may properly be extended to cover the case of a bill filed by a shareholder (who is not a creditor) to take the accounts of a company and deal with its assets for the benefit of those interested in them.

Some doubt is cast upon the authority of *The Dry Dock Case* in *Re Union Fire Insurance Company* (*g*); but it is submitted that the case is supported by sufficient authority, that it is an expedient and convenient application of well known equitable principles and that no Equity Judge should refuse to follow it.

In *Re Phœnix Bessemer Steel Company*, a question arose as to whether the company in question had the power to make a valid mortgage of future calls upon the shareholders in respect of the stock held by them, and with regard to the power of the Court to assist such a mortgagee in realizing upon his security, Jessel, M.R., says (*h*), "Now if a company may at their discretion mortgage future calls, there must be some way to make the mortgage a good mortgage. You may appoint a receiver and either order the directors to make calls and pay the proceeds to him, or you may order the receiver himself to make the calls. To say that a company may have a discretion to mortgage future calls, but no power to enable the mortgagee to enforce payment, is inconsistent. If there is a power the power can be enforced."

The right of creditors to proceed more directly against the shareholders of a corporation was sustained by V.C. Mowat in *Brooke* v. *Bank U.C.* (*i*); and by V.C. Strong in the same case as subsequently reported (*j*). In that case a bill was filed by an execution creditor of The Bank of Upper Canada against the Bank and three of the shareholders. The bill alleged that the plaintiff had delivered to the Sheriff of the County of York within which the Bank, while in operation, had its chief place of business, writs of execution against the goods and lands of the Bank; that the Sheriff had been unable to levy or make anything on either of the executions; that the debt remained wholly unpaid;

(*g*) 7 App. R. 787.
(*h*) 44 L. J. Chy. 683.
(*i*) 16 Gr. 249.
(*j*) 17 Gr. 301.

that the Bank had no assets out of which the plaintiff could obtain payment or satisfaction of any part of the debt; that the assets and property of every kind which the Bank had, had been wholly exhausted; that the stock of the Bank had been paid up; that the defendants the then shareholders had not yet paid anything in respect of the double liability imposed upon them by the Banking Act; that the aggregate sums which they were liable to pay in respect thereof, were not more than sufficient to pay and discharge the plaintiff's executions; that the defendants were directors or managing officers of the Bank; and that the shareholders were too numerous to be all made parties to the suit. The prayer was for an account of what was due to the plaintiff; for an account of the number of shares holden by the three defendants "and of the aggregate amount for which they are respectively liable as sureties as aforesaid for the debts of the said corporation; and that the defendants may be ordered to contribute in proportion to such liability to the payment of what may be found due to the plaintiff; that if necessary, an enquiry may be directed as to other persons who may be shareholders of the said Bank; that they may be ordered to contribute to the payment of the plaintiff's debt." The three defendant shareholders demurred for want of equity, and because all the creditors of the Bank were not made parties. The demurrer for want of equity was overruled, but the demurrer for want of parties was allowed, it being held that the bill should have been filed by the plaintiff on behalf of himself and all other creditors. V.-C. Mowat (*k*) intimated that in such a case, the Court would insist upon the assets being distributed *pari passu* among the creditors, and that the plaintiff would not be allowed to acquire priority over the other creditors by virtue of his having instituted the proceedings which resulted in the calling in of the assets. Such a doctrine, however, will not prevail where the remedy obtained by the plaintiff is the appointment of a receiver by way of equitable execution, for in such a

(*k*) 16 Gr. 253.

case the plaintiff will acquire priority as a reward for his superior diligence (*l*).

The appointment of a receiver is now the usual method of according equitable execution to a plaintiff who is unable to realize his claim under writs of *fieri facias* (*m*), and in such a case the plaintiff himself will be appointed receiver without giving security (*n*). A receiver may be so appointed either in an action brought for that purpose, or on motion in a pending action made at any time before the satisfaction of judgment (*o*).

Right of priority of creditor who obtains a receiver by way of equitable execution.—The lucidity and importance of the following extract from the judgment of the Supreme Court of the United States, in *Freedman's Savings and Trust Co.* v. *Earle* (*p*), with regard to the right of priority of a judgment creditor who is suing to enforce his judgment by equitable execution, is a sufficient reason for the length of the extract. "When the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution, unsatisfied, which, however, is not essential (*q*). But the execution must be sued out; for if the estate sought to be subjected is a legal estate and subject to be taken in execution, the ground of jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law (*r*); and if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment creditor is bound, nevertheless, to put himself in the same position as if the estate

(*l*) *Commissioners of Freedmans, etc.*, v. *Earle*, 110 U. S. Rep. at 715.

(*m*) *Anglo-Italian Bank* v. *Davis*, 9 Chy. D. 275; *Re Peace and Waller*, 24 Chy. D. 407; *Westhead* v. *Riley*, 25 Chy. D. 413.

(*n*) *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*o*) *Salt* v. *Cooper*, 16 Chy. D. 544; *Re Peace and Waller*, 24 Chy. D. 407

(*p*) 110 U. S. Rep. at 715.

(*q*) Lewin on Trusts, 513.

(*r*) *Jones* v. *Green*, 1 Wall. 330.

were legal, because the action of the Court converts the estate, so as to make it subject to an execution, as if it were legal. The ground of the jurisdiction, therefore, is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest, subject to prior incumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers according to the order in which they may be entitled to participate (*s*).

"It is to be noted, therefore, that *the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause;* and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, dates from the filing of the bill. '*The creditor,*' says Chancellor Walworth, in *Edmeston* v. *Lyde* (*t*), '*whose legal diligence has pursued the property into this Court, is entitled to a preference as the reward of his vigilance*'; and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the spoils thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit.' As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date. As was said by this Court, in *Day* v. *Washburn* (*u*), 'It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a Court of Chan-

(*s*) *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538.
(*t*) 1 Paige Ch. 637-640.
(*u*) 24 How. 352.

cery will enforce.' This is in strict analogy of the law, as it was recognized that the judgment creditor who first extends the land by *elegit* is thereby entitled to be first satisfied out of it. It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority (*v*). The filing of the bill, in cases of equitable execution, is the beginning of executing it.

"The passage cited from the opinion in *Day* v. *Washburn*, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent, in *McDermott* v. *Strong* (*w*). He there said: 'But this case stands on stronger grounds than if it rested merely on the general jurisdiction of this Court, upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired by means of their execution at law, what this Court regards as a legal preference or lien on the property so placed in trust,' and 'admitting that the plaintiffs had acquired by their executions at law *a legal preference to the assistance of this Court* (and none but execution creditors at law are entitled to that assistance), that preference ought not in justice to be taken away. Though it be the favourite policy of this Court to distribute assets equally among creditors, *pari passu*, yet whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this Court.' The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor, who was insolvent, the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors.

"This case, often cited, and never questioned, shows that the doctrine of equitable assets, to which we are referred by the appellant as the ground of his claim, has no application to the case. Ordinarily and strictly, the term

(*v*) *Rockhill* v. *Hanna*, 15 How. 189, 195; *Fayne* v. *Drew*, 4 East. 523.
(*w*) 4 Johns. Ch. 687.

equitable assets applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of his debts generally, or which being non-existent at law, have been created in equity under circumstances which fasten upon them such a trust (*x*). But as was said by Chancellor Kent in *Williams* v. *Brown* (*y*), the doctrine 'does not apply to the case of a debtor in full life, for there is no equitable trust created and attached to the distribution of the effects in the latter case.' Property held by a trustee for the testator is legal assets, for, although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet the analogy of the law will regulate the application of the fund. To constitute equitable assets the trust imposed by the party, or by the Court, must be for the benefit of creditors generally."

II. By Scire Facias.

Section 47 of "The Canada Joint Stock Companies Act, 1877," provides that "Each Shareholder until the whole amount of his shares has been paid up shall be individually liable to the creditors of the Company to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor before an execution against the Company has been returned unsatisfied in whole or in part; and the amount due on such execution not exceeding the amount unpaid on his shares as aforesaid, shall be the amount recoverable with costs, against such shareholder, and any amount so recoverable, being paid by the shareholder shall be taken as paid on his shares."

Section 53 of "The Ontario Joint Stock Companies Letters Patent Act," makes a very similar provision, but adds that "Any shareholder may plead by way of defence, in whole or in part, any set off which he could set up against the Company, except a claim for unpaid dividends, or a salary or allowance as a president or director."

(*x*) Adams on Equity, 254.
(*y*) 4 Johns. Ch. 682.

As is pointed out by Mr. Justice Strong in *McCracken* v. *McIntyre* (*z*), the provisions of the 86th section of "The Companies Clauses Consolidation Act, 1845," are *in pari materia* with these provisions of these statutes, and the decisions under the English Act are therefore directly applicable to the construction of our Act.

The action to be brought by the creditor against the shareholder referred to in our Acts, may be commenced by ordinary writ of summons, or it may properly be commenced by writ of *scire facias*, and the form of this writ and the statement of claim in such case is shown in the report of *Page* v. *Austin* (*a*).

The question of the construction of this statutory provision has caused a considerable deal of discussion in our Courts. In *McIntyre* v. *McCracken* (*b*), Moss, J. A., referring to a similarly worded statute says: "In its natural and obvious sense it is clear that the plaintiff who is the holder of a judgment against the Company upon which an execution has been returned unsatisfied, is bound, *prima facie* at least, to establish two propositions only against the defendant. First, that he is a shareholder; secondly, that the whole amount of the stock he holds has not been paid up."

Does the statute give the creditor an independent status, or does it simply by subrogation place him in the shoes of the Company.—One of the chief points in controversy in *McIntyre* v. *McCracken*, was whether such a creditor of a Company claims against the shareholders through the Company and therefore stands in the shoes of the Company, and is liable to be met by any defence which would be good as between the shareholder and the Company; or whether this statute confers upon the creditor a personal and original right as against the shareholder, paramount to any rights of the Company.

Upon this point there was much difference of opinion among the learned judges who heard that case, and although

(*z*) 1 Sup. Ct. Rep. 516.

(*a*) 7 App. R. 1. For English cases on enforcing payment by *sci. fa.*, see Fisher's Dig. 604 to 616; and 2 Chit. Eq. Index, 1491 to 1582.

(*b*) 1 App. R. 20.

the case was ultimately determined by the Supreme Court of Canada, this point cannot be said to be finally settled.

The facts of that case shortly stated were as follows: Certain shares of an incorporated Company were allotted by resolution of the directors among themselves at 40 per cent. discount, which was their supposed value, and scrip was issued for these shares as fully paid up. One G. acquired certain shares under this arrangement which he assigned to the defendant for value, representing them as being fully paid up; the defendant inquired of the secretary of the Company, who also informed him that they were fully paid up shares, and the defendant accepted them in good faith as such. The shares appeared as fully paid up in the transfer book and other books, but the true state of the case could have been ascertained by reference to the ledger and journal.

The case first came before the Court of Queen's Bench (*c*), where it was held that the defendant, before purchasing, had made sufficient inquiry, and that he was not liable to the plaintiff for the amount remaining unpaid upon the shares. This judgment was reversed by the unanimous judgment of the Court of Appeal (*d*), which proceeded chiefly upon the ground that the statute gave the plaintiff an original right, as against the defendant, paramount to, and independent of, any right which the Company might have against him. This judgment was in turn reversed by the Supreme Court of Canada (*e*), in which Court four of the Judges were in favour of reversing and two in favour of affirming the judgment of the Court below. Taking the case throughout its whole history, there were six Judges in favour of the plaintiff and seven Judges in favour of the defendant; and as the Judges who delivered the prevailing judgment of the Supreme Court did not agree in the reasons for their judgments, this case cannot be said to determine the question above noted.

(*c*) 37 U. C. R. 422.
(*d*) 1 App. R. 1.
(*e*) 1 Sup. Ct. Rep. 479.

Moss, J. A., delivering his opinion in the Court of Appeal (*f*), says: "The gist of this defence is that the plaintiff, without any fraud or default on his part, without any sin of commission or omission, is to be deprived of a statutory remedy, because the defendant trusted to, or perhaps misunderstood, the oral statement of the Company's Secretary.

"I find neither in reason nor precedent any ground for importing into the statute any such qualification of the defendant's liability or restriction of the plaintiff's rights. The language of the enactment is identical with that of the Railway Act which came under consideration in *Macbeth* v. *Smart* (*g*), *Ryland* v. *Delisle* (*h*), and other cases of undoubted authority.

"Those cases have placed it beyond doubt that a creditor of such a Company, when sueing a shareholder, does not claim through the Company or under the Company, but that he has a paramount right accorded to him by the statute. * * * This may be shown by a very plain illustration. The Company cannot sue a shareholder until a call has been regularly made; but a creditor can proceed against him at once for the full amount of his subscription, and that even in cases where calls could only be made after the observance of certain formalities and the lapse of certain intervals."

His Lordship then quotes with approval the following extract from the judgment of Chief Justice Draper, delivered in the Court of Appeal in *Macbeth* v. *Smart* (*i*): "Nothing can be clearer than this language, both as regards the liability of the shareholder and the remedy of the creditor of the Company. The former is subject to an individual liability for an amount equal to the amount unpaid upon his shares *until* the whole amount of his stock *has been paid up*; the latter has the right to recover from the shareholder the amount due upon the execution against the Company; provided always that so much is unpaid upon the shares. The creditor's right is made to depend upon the fact that

(*f*) 1 App. R. 24.
(*g*) 14 Gr. 298.
(*h*) L. R. 3 P. C. 17.
(*i*) 14 Gr. 310.

the shareholder has not as yet paid up his stock in full. This right differs from that given to the Company, who can only require payment in the manner and after the delays imposed by the statute; the creditor can call for immediate payment. * * * * The payment must have been made or the creditor's claim is untouched. * * * * The statute gives him (the judgment creditor) a new right, founded, it is true, upon his judgment, but not a right derived from or through the Company, his debtors. No act or consent of theirs is necessary to give effect to this new right, which depends on three things: first, that he is a judgment creditor of the Company unsatisfied; second, that they have no assets which he can reach by execution; third, that Macbeth is a shareholder in the Company and has not paid up in full. This is all that the statute requires."

When *McCracken* v. *McIntyre* came before the Supreme Court (*j*), Strong, J., after referring to *Macbeth* v. *Smart* and *Ryland* v. *Delisle*, says: "I refer to these cases to point out that they are no authorities for a proposition which it has been assumed they warrant, viz., that in an action brought by a creditor under this enactment, the creditor sues on a statutory liability imposed upon the shareholder by the statute, and not upon the contract entered into by the shareholder of the Company. * * * * * The bargain with the Company must be the measure of the shareholder's obligation; the liability sought to be enforced under this section is not one arising *ex delicto*, but is entirely based on contract, whether arising from the agreement of the parties or from the statute; for at most, if the statute has the effect the Court below has attributed to it, it can only be considered as annexing an additional term in favour of the creditor to the contract, not fixing the defendant with liability for any tortious conduct. Then there being this single liability on the part of the shareholder to pay just what he has agreed to pay and no more, and to pay in the particular manner he has contracted to pay and not other-

(*j*) 1 Sup. Ct. Rep. 515.

be entered upon the register of members before the subscriber can become a member under the provisions of this clause.

On the other hand the Dominion Letters Patent Act (*n*) provides that "the expression 'shareholder' means every subscriber to *or* holder of stock in the Company;" and the Ontario Letters Patent Act (*o*) contains a similar provision.

Bacon, V. C., in discussing the effect of the provision of the English Act above cited (*p*), says: "In order to constitute a man a shareholder, all that was required by the provision of the Companies Act, 1862, was that he should agree to take shares and that his name should be *duly* placed on the share register. These provisions had been made for the benefit of creditors of the Company; therefore, in questions as between shareholders and creditors, persons who had complied with the requirements of the act could not be heard to say that they were not shareholders."

The effect of a Canadian Statute worded similarly to the Dominion Letters Patent Act, is discussed in *Smith* v. *Spencer* (*q*).

(*To be concluded.*)

A. H. MARSH.

(*n*) 40 Vict. cap. 43, sec. 2. (*o*) R. S. O. cap. 150, sec. 2.
(*p*) *Tucker's case*, 41 L. J. N. S. Chy. at 161.
(*q*) 12 U. C. C. P. 277.

EDITORIAL REVIEW.

Fusion of Circuits.

The cases of *Masse* v. *Masse*, ante, p. 233, and *Pawson* v. *The Merchants' Bank*, ante, p. 279, raised the question whether a technical rule respecting the issue of writs had the effect of depriving a suitor, whose writ happened to be issued from the Chancery Division, of his right to a jury in a proper case.

When Rule 545 (ante, p. 23) was passed, the business of the Chancery Division was increasing very rapidly, from various causes, and it became necessary to adopt some measure which would equally distribute the business of the High Court amongst the three Divisions. Both of the cases in question were in the Chancery Division, and in each the defendant wanted a jury. Two Judges of that Division determined that the result of the new rule was to compel them to accept every case which fell in their Division in due course, except where there were strong grounds for requiring a jury, upon which being shown the case would be transferred. The jury notice was accordingly struck out in each case. *Pawson* v. *The Merchants' Bank* now determines that the old practice still governs as laid down in *Bank of B. N. A.* v. *Eddy*, 9 P. R. 468.

Notwithstanding the decision of the Court of Appeal, there was and is a great deal to be said in favour of the decisions of the Chancery Judges in the two cases in question, in so far as they carry out, or were intended to carry out, the spirit of Rule 545. The rule was passed expressly for the purpose of equalizing business in the three Divisions of the High Court. This provision would be frustrated if every Common Law action which fell to the Chancery Divi-

sion were immediately transferred to one of the other Divisions, merely because a jury notice had been served. The Chancery Judges, therefore, did the most natural thing for themselves to do, namely, they carried out the spirit of the rule by retaining the cases, and carried out the spirit of equity by striking out the jury notices. The latter act was assumed to be a necessary condition of the cases being allowed to remain in the Chancery Division. The only true construction of Rule 545 seems to be to allow every case to remain in the Division from which the writ issued. But it does not seem to be within its spirit to peremptorily subject every case, which by accident falls into the Chancery Division, to a specific mode of trial. Such a rule, when more plainly expressed, is merely this, that every third case commenced by writ of summons in the High Court of Justice shall be tried without a jury unless some very strong reason to the contrary is shown. It amounts to nothing more, nothing less.

The assumption that every case in the Chancery Division must be tried by a Judge without a jury is the theoretical obstacle to the perfect working of Rule 545, while the separate sittings of the Judges of the Chancery Division for the trial of actions is the practical obstacle.

There is no such thing on the reading of the Judicature Act as a trial by the peculiar method of the Chancery Division, as distinguished from the peculiar methods of the other Divisions. The fact is, that every case tried by a Judge of the Chancery Division is tried without a jury; but the fact exists only because the practice has been made by the Judges since the Judicature Act was passed.

It is no longer the case that an action is brought in the Chancery Division because its subject matter is peculiarly of equitable jurisdiction. It comes by chance. Now the mode of trial should not be, and is not, fixed by chance. Section 45 of the Judicature Act enacts that, in causes which would before the Act have been within the exclusive jurisdiction of the Court of Chancery, the mode of trial shall be according to the practice of the Court of Chancery; and in

other causes the mode of trial is to be the former mode of trial in Courts of Law. If the intention had been that all equity cases were to go to the Chancery Division, and all Common Law cases were to go to the Common Law Divisions, and that the modes of trial in the Chancery and Common Law Divisions were to be those formerly in vogue in the Court of Chancery and the Courts of Law respectively, the Legislature could have (we will not say would have) said so. The scheme of the Act did not permit this. Sections 9 and 16 clearly show this. All the Divisions and all the Judges are to have ample jurisdiction without distinction. From the beginning, a case might have been brought in any Division of the High Court; and because equity cases might be brought in what are erroneously termed the Common Law Divisions, and because what are erroneously called Common Law cases might be brought in the Chancery Division, it became necessary to provide for two modes of trial—one by a Judge alone, the other by Judge and jury. Section 45 merely continues the former state of things. As we had, before the Act, jury cases and non-jury cases, so we now have jury cases and non-jury cases. Before the Act the Common Law Judges tried equitable issues and Common Law issues—the former without, the latter with or without a jury. Since the Act, the Judges of two Divisions try both equitable issues and Common Law issues, as before. But the Judges of the third Division will try Common Law issues only on condition that they are to be tried without a jury. There is no more reason for this than there would be for the Judges of the other Divisions to say that they will only try cases on condition that they are to have a jury in each case.

The whole scope of the Act and rules, and particularly Rule 545, is that there shall be no distinction between the several Divisions of the High Court. But a distinction is made by the Judges of the Chancery Division sitting as such for the trial of cases in their own Division; and it will be continued as long as they continue to sit as Judges of the Chancery Division. Let all cases be divided, as by law

they are divided, into jury cases and non-jury cases; and let the High Court appoint its sittings for the trial of all actions, once in the spring and once in the autumn for each county town. In all towns and some of the cities one Judge could easily take all jury cases first and then all non-jury cases. In the large cities the business would require the attendance of at least two Judges; in Toronto perhaps three would have to sit at once; or the sittings might be more frequent. But this is mere matter of detail. The first step having been taken by Rule 545, let the next be the appointment of particular days for the sittings of the High Court in each of the county towns.

The Canada Temperance Act and Compensation.

The promoters of the movement which is designed to bring into force the Canada Temperance Act lately secured what they may be pleased to call the services of a gentleman from the United States, who, from his title of Honourable, either is or was a judge or a legislator in his own country. At any rate, he appears to have a sufficient knowledge of law to understand that private property in the United States is forbidden by Constitutional provision to be taken by the state without compensation, while in Canada there is no written prohibition against gratuitous expropriation. And on this ground—the supremacy of the legislature—he advocated the total prohibition of liquor selling, without compensation to a trade which is perfectly lawful, and which must suffer immense losses wherever the Act is brought into force.

That a preacher of temperance should insist upon the observance of morality only under restraint does not redound to his credit; nor does it advance the cause which he advocates. There are many grossly immoral acts which the law does not either expressly or by implication forbid; and to put such an argument as that used by the honourable orator into the mouth of an immoral man, is to give

him a free rein to drive to destruction. There is no law, either express or implied, against drinking intoxicating liquor; therefore, by the same argument, a man may drink until he destroys himself. The cause is desperate when rapine and plunder may be freely advocated in its advancement.

Though our legislatures are bound only by the limits of their topical jurisdiction, it has always been a principle of our Constitution, as it is a principle of British Constitutional usage, that the rights of property are to be respected; indeed, the preamble of the British North America Act expressly recites the design of establishing a union "with a Constitution similar to that of the United Kingdom." And it might fairly be argued that this is a written prohibition against any departure from the well-defined, though unwritten, principles of morality which are invariably observed as constitutional maxims in British legislation.

As a matter of principle, gratuitous expropriation is as pernicious an act when done indirectly as it is when done directly. The direct suppression of a lawful trade ought to be accompanied by a tender of compensation for the destruction or depreciation of capital, plant, and other property belonging to those concerned in the trade. The indirect suppression of a lawful trade, when that is a clear and natural consequence of a law made respecting it, should just as certainly be accompanied by a tender of compensation in order to make it a just law.

It is easy to understand that the advocates of total prohibition have a very natural repugnance to contributing their share towards such an object; but they are as little able to judge of the expediency of compensating brewers and distillers for their losses, as brewers and distillers are to judge of the expediency of suppressing their trades.

There is a very grave difficulty, however, in the way of making compensation to the brewers and distillers while the Act is in its present shape. Though the bringing into force of the Act must necessarily be followed by an immediate depreciation of property and loss of capital, the loss

may be but temporary. It does not follow, because the Act is brought into force, that it will remain in force forever, or even for a lengthy period. Judging by the fate of the Dunkin Act, the life of the Canada Temperance Act will not be a long one. In some counties it may possibly be thrown out in disgust before very long. How then is compensation to be made? The repeal of the law would be followed by a reaction which would greatly benefit the trade. And it would be a matter of absolute impossibility to estimate the losses which should be made good on such an hypothesis.

The new Lord Chancellor.

Sir Hardinge Giffard is to be Lord Chancellor of the new Conservative Government. The appointment seems to be regarded with favour in England.

REVIEW OF EXCHANGES.

Central Law Journal.—*17th April*, 1885.

The Present Law of Payment for Goods, by A. J. DONNER. The subject is treated under the heads, Demand of price, Reasonable time, Cash sales, Transmission of price, Time of payment, Medium and mode of payment, and Tender. The cases cited are very numerous.

Ibid.—*24th April*, 1885.

Quantum Meruit—Services, by W. W. THORNTON. The cases are considered which bear upon the right of a party to recover for services where no mention of compensation was made at or before the time they were rendered. As a general rule the law will imply, from the fact of service, both a contract of hiring and a promise to pay. Unless the work is done under circumstances justifying the belief that no charge is intended, a liability arises, even though no charge was in fact intended by the labourer during his service. An intention on the part of the person hired during the service to charge therefor, is not necessary; it is sufficient that the one for whom the labour is done expected to pay for it. If the services are to be compensated in part by a testamentary provision, and no such provision is made, the estate of the employer is liable for enough to make up what the services were reasonably worth. Where a close family relationship exists between the plaintiff and defendant, the presumption of a promise to pay may be rebutted by this circumstance. Cases of this class are fully treated of.

Ibid.—*1st May*, 1885.

Obligation of Landlord to Repair Unhealthy Premises, by JOHN F. KELLY. Adjudications upon the obligation of a landlord to let no premises but such as may be occupied without danger to the health of the tenant, and to keep the demised premises in a sanitary state as a condition precedent to the right to recover rent appear to be contradictory, both in England and in the United States; and the statements of the law upon the subject as laid down by the text-writers exhibit a diversity of views. If any rule can be formulated in the present aspect of the authorities, it is that the fact that the premises are unwholesome will not entitle the tenant to quit them (i) where he knew or could have known

that fact; and (ii) where the landlord has not been guilty of fraud or misrepresentation, and is in no default. The learned writer urges that by the universal rule of law the right to demand rent and the right of the tenant to require that the premises be kept tenantable from a sanitary point of view should be considered reciprocal, as the only consistent construction of the contract, the object and purpose of which is to obtain a place to reside in. A late case in New York is said to uphold this doctrine, the unhealthy condition of the premises being determined by the Court to work a constructive eviction which destroyed the right to claim rent. But see *Denison* v. *Nation*, 21 U. C. R. 57.

Ibid.—*8th May*, 1885.

Counter-Claims in Actions ex delicto, by H. J. Whitmore. While the cases collected appear to be decisions in jurisdictions where the right of counter-claim is more restricted than under the practice in this Province, they are interesting, and may be found useful.

Married Women's Attorneys at Law, by David Stewart. The right of a married woman to appoint an attorney, at Common Law, in Equity, and under Statute, is treated of. The article then proceeds to discuss the liability for the costs of her litigation as existing on the part of (i) her husband, (ii) her next friend, or trustee, and (iii) herself, both *in personam* and *in rem*.

Ibid.—*15th May*, 1885.

Preferences in Compositions with Creditors, by Elisha Greenhood. Any contract which secures to one or more of the creditors any secret advantage over the other creditors is void as a fraud on the others and opposed to public policy. It is immaterial that the agreement was given without the debtor's knowledge; nor does the fact that the debtor was not injured, and that the funds for the other creditors were not rendered less available make the contract any more creditable. The sole question is whether the judgment of the creditor has been influenced by the supposition that all are to suffer in the same proportion. The different methods by which dishonest debtors have sought to accomplish the objects condemned by the rule are instanced, and very numerous cases cited to exemplify the steady adherence of Courts to it.

Ibid.—*22nd May*, 1885.

The Effect of taking Security upon a Lien, by Charles Burke Elliott. The article deals wich those acts of a vendor of property which will be held to effect or evidence a waiver of his lien for unpaid purchase money, such as parting with the possession of the goods before payment, terms of sale inconsistent with an intention to retain possession of the goods until payment, taking additional or collateral security, etc. The English rule of law in such cases has not been uniformly adhered to by American judges.

Criminal Law Magazine.—November, 1884.

The Right of Trial by Jury, by MERRITT A. THOMPSON. Cites American cases.

Ibid.—January, 1885.

Bail in Criminal Cases, by SEYMOUR D. THOMPSON. An exhaustive article, dealing with the subject as at common law and as governed by constitutional and statutory provisions. The principles by which the discretion to admit to bail should be governed are fully treated of, and English and American decisions referred to.

Ibid.—March, 1885.

Dynamiting and Extra-Territorial Crime, by FRANCIS WHARTON. The subject is treated under four heads:—(i) What is the law of nations in regard to crime attempted in one country to be consummated in another. (ii) What is the law in this relation adopted in England as common law. (iii) What is the law accepted in the same relation by State Courts. (iv) What statutory jurisdiction in the same relation exists in the federal system. Under the second head, considerable space is devoted to an interesting statement of the Orsini case, and earlier and later trials of an international and political complexion are referred to. It would appear that the jurisdiction of United States Federal Courts is limited to the cognizance of offences against foreign sovereigns, while offences against the subjects of foreign sovereigns fall within that of the Courts of the particular State in which the offender resided at the time of the offence. The federal judiciary have no common law jurisdiction of crimes.

Ibid.—May, 1885.

Indictment of Corporations, by ADELBERT HAMILTON. After considering the various objections to the liability of a corporation to indictment for the misfeasance or nonfeasance or duties, argued and overruled in the earlier cases, the learned writer proceeds to lay down the criterion by which to determine upon the indictment of a corporation as an affirmative answer to two questions; (i) Is the corporation under a legal obligation to perform the duty omitted or improperly done? (ii) Is the breach or misperformance of it a matter of general and public concern? The various duties and public obligations of different kinds of corporations in this connection are then considered, as well as the form of the indictment, evidence necessary to be adduced, defences which may be raised, and the nature of the penalty or sentence.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 4th March, 1884.

HATELY v. THE MERCHANTS' DESPATCH CO.

Security for costs—Delivery out of bond—Case in the Court of Appeal.

Where the plaintiff, who lived out of the jurisdiction, obtained a verdict at the trial which was affirmed upon motion to the Divisional Court (except as to one defendant, against whom the action was dismissed without costs), and the defendants were appealing to the Court of Appeal,

Held, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled, notwithstanding that the judgment in the plaintiff's favour was liable to reversal in the Court of Appeal.

Aylesworth and *J. E. Lees*, for the plaintiff.
Plumb and *C. Millar* for the defendants.

[27TH MAY, 1885.

MOXLEY v. CAN. ATLANTIC RY. CO.

Affidavit of documents—Motion for better affidavit.

The decision of Rose, J., ante p. 183, was reversed on appeal.

The rule laid down in *Jones* v. *The Monte Video Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject of production of documents, but it should be read in conjunction with *The Attorney-General* v. *Emerson*, 10 Q. B. D. 191.

The affidavit of documents filed in this case stated that the defendants objected to the production of the documents in question because "they are in constant use in the business of the defendants and are necessary for that purpose."

Held, that the affidavit was wholly insufficient and that the books must be produced.

W. H. P. Clement, for the appeal.
Lefroy, contra.

[30TH JUNE, 1885.

IVEY v. KNOX.

Insolvency—Policy of Insurance—Assignment for Creditors—Preference—R. S. O. Cap. 118, Sec. 2.

I. being insolvent and unable to pay his debts in full, with the intent and for the purpose as admitted by him of giving them a preference over other creditors, assigned to certain creditors two policies of insurance, the assignment having also been obtained, by the latter to secure the debts due them in preference to the other creditors, and they being well aware of the insolvent state of I. The jury also found that an alleged pressure brought to bear upon I. by the creditors in question to induce him to make the assignment was not real but was made for the purpose of getting a preference.

Held, that the assignment was null and void under R. S. O. Cap. 118, sec. 2, as against the other creditors of I., and must therefore be set aside.

McCarthy, Q.C., for the motion.
Meredith, Q.C., contra.

WILLCOCKS v. HOWELLS.

Libel—Recovery against several—Subsequent action against others—Estoppel.

A recovery in libel against some of several tort-feasors, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel.

Wallace Nesbitt for the motion.
Robertson, Q.C., contra.

HILLYARD v. GRAND TRUNK RY. CO.

Barbed wire fence—Injury therefrom—Non-liability for—Rejection of evidence.

Held, O'Connor, J., dissenting, that in face of 46 Vict. cap. 18, sec. 490, s-ss. 15 and 16, which seem to sanction them and empower municipalities to provide against injury resulting from them, barbed wire fences constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind, and therefore, that the defendants were not liable for the loss of the plaintiff's colt which, while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death. But,

Held, that if the doorways of shops and the boundaries of private residences, churches and other buildings on the sidewalks of thoroughfares, and perhaps on all sidewalks were so fenced, such fencing would be a nuisance.

Held, also that the colt in question, five weeks old, following its dam could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam.

Semble, that if a top rail or capping would enable a fence of the kind to be better seen by men or animals it should be used.

Held, also, that evidence of the common use of fences of the kind in other townships, and of their encouragement, should not have been rejected as showing that they were not dangerous or a nuisance.

Wallace Nesbitt for the motion.
M. E. O'Brien and *G. H. Watson*, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 30TH MAY, 1885.

MAHONEY v. MACDONELL.

Trial—Evidence—Exclusion of witnesses.

At the beginning of the trial of the action all witnesses were ordered out of Court, but the parties to the action were not requested to retire. Judgment having been given dismissing the action against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in Court and heard the whole of the evidence adduced by the plaintiff.

Held, that the evidence of P. was improperly rejected, and a new trial was ordered with costs to be paid in the cause to the defendants.

Cattanach, for the plaintiff.
Aylesworth, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST MAY, 1885.

MAGEE v. KANE.

Contract of sale—Statute of frauds—Possession of tenant—Part performance.

When a person came into possession of property as tenant, and it was shown by unequivocal facts that his tenancy was afterwards relinquished, and that his possession being changed by parol contract to purchase, was continued as that of vendee,

Held, that the possession thus changed was such part performance as took the contract out of the Statute of Frauds.

The new fact showing the change in the character of the possession in this case was part payment of the purchase money, evidenced by the receipt in terms thereof; and the possession continuing under the newly created relationship between the parties was held to be an act of part performance affecting the land, solely referable to the contract to purchase, operating by and against both, and to enforce which either one could be the actor.

Gormully, for the plaintiff.
Cassels, Q.C., for the defendant.

COOK v. EDWARDS.

Farm lease—Covenants—Right to increase arable land.

A lease of a farm contained a covenant that the lessee "shall and will at his own costs and charges repair and keep repaired the erection and buildings, fences and gates erected or to be erected upon the premises, the said lessee finding or allowing on the said premises all rough timber for the same, or allowing the said lessee to cut and to fell so many timber trees upon the premises as shall be requisite."

Held, that the above words must be read as if "hereby" was inserted before "allowing"; and the lessee was entitled, as occasion arose, to use the timber for such purposes.

Held, also, that the landlord was not to control the user of the timber. so that he might limit it to the repair of the buildings, fences and erections existing at the date of the lease.

Held, also, that on the proper construction of the lease the lessee was at liberty to bring other parts of the demised premises under cultivation without the landlord's assent, and to fence the same without his assent. if it was a reasonable and proper thing in the course of judicious husbandry so to increase the arable area of the farm.

J. K. Kerr, Q.C., for the plaintiff.
Falconbridge, for the defendant.

GRAHAM v. WILLIAMS.

Mechanic's lien—Right of lien-holder against tenant to charge the fee.

The judgment of the Chancellor, ante, p. 87, was affirmed.

Held, also, that the Mechanics' Lien Act, R. S. O. cap. 120, gives priority to a lien on the increased value over a mortgage existing or created before the commencement of the work, but not over subsequent mortgages.

Maclennan, Q.C., for the plaintiff.
Gormully, for the defendant.

[PROUDFOOT AND FERGUSON, JJ., 21ST MAY, 1885.

THOMPSON v. THE CANADA FIRE & MARINE INS. CO.

Directors—Consent to transfer of stock—Absence of fraud.

On an appeal by the defendants from the judgment of Boyd, C., 6 Ont. R. 291; 4 C. L. T. 131,

Held, that as the transfers complained of were within the scope and power of a board of directors, and were found upon the evidence to have been made without fraud, the appeal should be allowed and the action dismissed with costs.

McCarthy, Q.C., and *Wallace Nesbitt*, for the appeal.
MacKelcan, Q.C., and *Moss, Q.C.*, contra.

[BOYD, C., 22ND APRIL, 1885.

KITCHEN v. DOLAN.

Purchase of land—Evidence of agency—Statute of Frauds.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name.

Held, that the evidence of D.'s agency was admissible though not evidenced in writing.

Quære, whether *Bartlett* v. *Pickersgill*, 1 Cox 15, is still to be regarded as law.

Cassels, Q.C., and *Matheson*, for the plaintiff.
Martin, Q.C., and *Livingstone*, for the defendant.

[23RD MAY, 1885.

COLEMAN v. KING.

Mortgage—Construction according to true intent—Printed and written proviso.

W. H. conveyed his farm to his son, and took back from him a mortgage thereon, which was expressed to be made in consideration of $4,000, and contained a proviso for redemption on payment of $4,000, "in manner

following:—To pay W. H. and A. H. his wife during their joint lives $300 a year, and to continue to make the said payments to the survivor after the death of either during the life of the said survivor;" and at certain fixed periods after his death to pay his brothers and sisters $500 each. Following this proviso was a declaration that thereupon the mortgage should be void. The proviso was inserted in writing, the instrument having been drawn up on a printed form.

W. H. died shortly after taking the mortgage, but A. H. his widow lived for many years; and the amounts necessary to pay for the support of W. H. and A. H. and all the sums due to the brothers and sisters exceeded $4,000.

Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeazance clause upon payment of $4,000 without interest being quite irreconcilable with the particulars regarding the payments, the Court must regard the general intent of the deed, and give it such construction as supported that general intent; and that upon the true construction thereof the mortgagor was bound to pay all the specified sums though they exceeded in the aggregate the sum of $4,000.

Robert Armour, for the plaintiff.
Moss, Q.C., for the defendant Hill.
E. Douglas Armour, for the defendant King.

[26TH MAY, 1885.

PELLS v. THE CITY OF TORONTO.

Municipal by-law passed in private interest—Injunction.

Corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of an individual at the cost of another, the general public not being interested, their action will be restrained by the Courts. P. was the owner of a small piece of land at the south end of Johnson's lane, which had been reserved when the lane was laid out. Johnson's lane extended half way between Adelaide and King streets, in the City of Toronto. M. and T. were the owners of the property extending from Johnson's lane to King street, and were desirous of obtaining access to Adelaide street through the lane, and over P.'s reserved part, and tried to purchase it but failed.

A by-law to open up Johnson's street, initiated by the petition of M., T. and others, reciting that "they were desirous of securing communication between King and Adelaide streets for vehicles by means of the above street and certain lanes to the south thereof," but only providing for the opening up to M. and T.'s properties, was passed by the Council of the City of Toronto, and was about to be sealed when P. brought his action to restrain the Council from further proceeding with the same.

Held, that P. was entitled to succeed and the injunction was granted with costs.

H. D. Gamble, for the plaintiff.
Foster and *McWilliams*, for the defendants.

EXCHANGE BANK v. COUNSELL.

Winding up proceedings—Payment to creditors—45 Vict. cap. 23, sec 75.

The plaintiff Bank suspended payment on 15th September, 1883. Winding up proceedings were commenced on 22nd November, and an order made on 5th December. The defendants C. and S. being depositors in the Bank, drew a cheque for $4,000 on 1st November on their deposit account, which was given to D., a debtor of the bank, on notes maturing the following December and January. D. gave mortgage security for the cheque on 31st October. The arrangement was all made about 5th October, although the security was not given until the 31st, and the cheque was not presented to the bank until 23rd November, when it was accepted as payment of the maturing notes.

In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheques as having been paid after the winding up proceedings were commenced, it was

Held, that the defendants could not be proceeded against to make them account for the $4,000 upon a statement of claim alleging that there was an illegal payment of that sum upon their cheque. Upon the facts there was no payment by the bank to the defendants.

C., who was being sued by the bank, obtained the defendant's cheque for $2,118, giving security therefor on 21st November, and retired the notes in suit on 23rd November.

Held, that the defendants could not be ordered to repay the amount of the cheque as being a wrongful payment under 45 Vict. cap. 23, sec. 75.

Maclennan, Q.C., and *Bain, Q.C.*, for the plaintiffs.
E. Martin, Q.C., for the defendants.

EXCHANGE BANK v. STINSON.

Winding up proceedings—Payment of cheques on deposit accounts after suspension of Bank—45 Vict. cap. 23 (D).

The plaintiff Bank suspended payment on 15th September, 1883. Winding up proceedings were commenced on 22nd November, and an order made on 5th December. R. and G. H. purchased a stock of hard-

ware held by the Bank, on which they owed $14,000 at the time of the suspension. The Bank wishing to close the accounts, sold the balance of the stock to A. H. & Co. for $5,700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the Bank on 31st October. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. and G. H. settled the balance of their debt.

In an action by the liquidators of the Bank against the defendant to recover back the amount thus paid on the defendant's cheques under 45 Vict. cap. 23, it was

Held, that the plaintiff could not recover.

The defendant also owed A. H. & Co. a debt, and gave his cheque on the Bank for $92 in part payment thereof, which the Bank accepted from A. H. and Co. on 23rd October, in retiring an overdue bill.

Held, that that amount could not be recovered back.

On 19th November the defendant sold his cheque for $320 to his uncle C., who was the local head of the Bank, which cheque was negotiated and accepted by the Bank on 23rd November, after winding up proceedings had commenced.

Held, that, although it probably was an invalid transaction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of the 75th section of the Act.

Macennan, Q.C., and *Bain*, Q.C., for the plaintiffs.
E. Martin, Q.C., for the defendant.

[2ND JUNE, 1885.

THE VICKERS EXPRESS CO. v. CANADIAN PACIFIC R. CO.

Consolidated Railway Act, 1879—Express Companies—Reasonableness of Rates—Facilities.

In an action by an Express Company against a Railway Company and another Express Company to which certain privileges were granted by the Railway Company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the plaintiffs' Express Company, and in which it was claimed that the Court should enquire into and settle whether the rates charged by the Railway Company were reasonable or not,

Held, that even if the Court had jurisdiction to enquire into the reasonableness of the rates, which was doubtful, no collusion being shown between the defendant companies it would not, on the record and evidence in this case, do so.

Held, also, that the employment of the station agents of the Railway Company to act as agents of the Express Companies, with the privileges they had at the stations, is a facility within the meaning of the Consolidated Railway Act of 1879, 42 Vict. cap. 9, sec. 6, s-s. 3, and that when such privilege is granted to one Express Company and refused to another whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of the Act.

Robinson, Q.C., *McCarthy*, Q.C., and *Creelman*, for the plaintiffs.

S. H. Blake, Q.C., and *Cassels*, Q.C., for the defendants the Railway Company.

Moss, Q.C., for the defendants the Express Company.

[10TH JUNE, 1885.

COLE v. THE CANADA FIRE INSURANCE CO.

Short cause—Certificate of Counsel—G. O. 420.

The certificate of counsel required by G. O. 420 before a cause will be set down for argument in the Chancery Division during the month of June may be given by counsel for a party other than the party setting the cause down.

Holman, for the plaintiff.

Bain, Q.C., for the defendants.

REGINA v. ST. CATHARINES M. & L. CO.

Constitutional law—Indians—Title to the soil.

In the whole course of the constitutional usage of the Crown in America, the title to the soil has always been assumed to have been in the Crown; and the Indians, though always the object of the bounty and benevolence of the Crown, have never been recognized as having any title which was the subject of transfer.

Held, therefore, that when the Government of Canada, by treaty with the Indians occupying a portion of the Province of Ontario, allotted to them a reserve to which they retired, it acquired no title to the soil from which they had removed, but the same belonged to the Province as public land.

Mowat, Q.C., A.-G., and *Cassels*, Q.C., for the Province of Ontario.

McCarthy, Q.C., and *Creelman*, for the defendants.

WILLIAMS v. ROY.

Executors—Compensation—Amount fixed by will.

A will contained the following clause:—"I hereby authorize and direct my said executors to retain for their own use and benefit the sum of two hundred dollars each in lieu of all charges for their services in performing the duties hereby imposed on them as executors of this my will." An action having been instituted for the construction of the will and administration, the executors, who had retained the sum of $200, claimed the further sum of $580 as compensation for their services, which, as admitted by all parties, was a reasonable and proper sum for the executors to retain, if not prevented by the express clause in the will.

Held, that the amount of compensation having been fixed by the will, the executors were bound by the terms of R. S. O. cap. 107, sec 39, to accept that and no more.

Lash, Q.C., H. W. M. Murray, Hoyles, and *Lefroy* for various parties.

[11TH JUNE, 1885.

DARLING v. THE MIDLAND RAILWAY CO.

Provincial Railway brought under Dominion control—Procedure under Railway Acts—Appeal from award.

Certain land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in August, 1884. On the 25th May, 1883, the defendants' railway became by statute a Canadian road, and subject to the legislative authority of Canada, having previous to that date been an Ontario road.

Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied, and therefore that an appeal from an award could not be prosecuted under the Ontario Railway Act.

Geo. Tate Blackstock, for the plaintiff.
Lash, Q.C., for the defendants.

BARCLAY v. ZAVITZ.

Will—Devise of mortgage—Maintenance of wife—Principal and interest.

G. H. Z. in his will provided as follows:—"With respect to a certain mortgage * * * my will is as follows. I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the

sum of $200 to be paid them respectively when the youngest of my said children reaches the age of 21 years, and if any of my children shall not have been married before that time, the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies * * * if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy * * * shall be divided among their surviving sisters. The balance of the proceeds of said mortgage I give and bequeath to my said wife to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family during the natural life of my said wife, after which my will is that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving."

Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided, and that the widow had the right to draw *bona fide* from the proceeds of the mortgage even if it consumed the whole of the *corpus*.

A matter involving the proper construction of a will cannot be brought up on petition under R. S. O. cap. 107, sec. 35.

Moss, Q.C., for plaintiffs.
J. Hoskin, Q.C., for infant.

SNIDER v. SNIDER.

SNIDER v. ORR.

Delivering defence after expiry of time—Motion for judgment—Service on local agent—Waiver.

A defence delivered after the time limited by the rules is irregular, and though the Court cannot pronounce judgment on a motion therefor in default of pleading regularly set down before the delivery of the defence, yet the Court will impose terms upon the defendant.

Whether service of pleadings upon an agent in an outer county is good, *Quære*.

In these cases the defendants did not deliver their defences within the time limited by the rules, and the plaintiffs' solicitors, who practised in Chatham, prepared the necessary papers and sent them to their Toronto agents, in order that they might set the actions down on motion for judgment in default of pleading. On the day on which the actions were set down in Toronto, the defendants' solicitors delivered their defences in Chatham.

On the return of the motions, *E. Douglas Armour*, for the plaintiffs, moved for judgment on the allegations in the statements of claim, pursuant to Rule 211.

Holman, for the defendants, contended that, the defences having been delivered, judgment could not be pronounced on this motion. He also contended that in any event the plaintiffs were not entitled to judgment, because the plaintiffs' solicitors, instead of serving the statements of claim on the Toronto agents of the defendants' solicitors, who practised in London, had served them upon a solicitor in Chatham, who had acted as agent for the defendants' solicitors in entering appearances in the actions; and he read an affidavit to the effect that the Chatham solicitor was not an agent of the defendants' solicitors for the purpose of receiving papers. The statements of claim should have been served upon the solicitors themselves or on their Toronto agents. He cited *Omnium Securities Co.* v. *Ellis*, 2 C. L. T. 216.

Armour, in reply. The statements of claim were received by the defendants' solicitors, and they asked for time to plead, and subsequently delivered their defences. They were therefore estopped from objecting to the service.

The CHANCELLOR said that by the former practice in Chancery service on a local agent was good; the case of *Omnium Securities Co.* v. *Ellis* could not be overruled without consideration, but at present it was not necessary to consider it, because the defendants' solicitors had waived any objection to the service of the statements of claim by asking for time to plead and by subsequently delivering their defences. Then, as to the motion for judgment, such a case could not have arisen under the former practice where a note *pro confesso* was entered in default of pleading, and the defendant was then obliged to make a substantive application for leave to answer. Under the present practice, where the case was one which had to be set down on motion for judgment, there was nothing to prevent the defendant from delivering his defence at any time up to the time of pronouncing judgment, and thus obstructing a motion for judgment. The plaintiffs in these cases were perfectly regular in setting down their actions on motion for judgment, and the delivery of the defences after the expiry of the limited time was clearly irregular. There should be no encouragement to irregularly delivering defences, though the rules seem to permit it. The expense of the motions would not have been incurred had the defences been delivered within the proper time. The defendants should therefore pay the costs of the plaintiffs occasioned by the irregular delivery of their defences, within ten days from taxation; and upon such payment the defences might remain on the files. In default of such payment the defences should be struck out and judgment granted as prayed.

[PROUDFOOT, J., 2ND DECEMBER, 1884.

THE VICKERS EXPRESS CO. v. CANADIAN PACIFIC R. CO.

Consolidated Railway Act, 1879—Express Company's facilities—Parties.

In an action by an Express Co. against a Railway Co. to compel the defendants to afford the plaintiffs the same "facilities" that they did to another Express Co., alleging that the right to employ the station agents of the Railway Co. as agents of the plaintiff Express Co. was such a "facility," and had been refused to the plaintiffs although granted to the other Express Co.,

Held, that such right was a "facility" within the meaning of The Consolidated Railway Act of 1879, sec. 60, s.-s. 3, which provides that any facilities granted to one incorporated Express Co. shall be granted to others.

Held, also, that the plaintiffs could not compel the defendants to give the use of their agents, but if the defendants allow the agents to act for one Co., it is a facility that cannot be denied to the other Co.

The action was, however, dismissed on the ground that the other Express Co. had not been made a party, but without costs.

McCarthy, Q.C., and *Creelman*, for the plaintiffs.
S. H. Blake, Q.C., and *R. M. Wells*, Q.C., for the defendants.

[FERGUSON, J., 16TH MAY, 1885.

WHITLEY v. GOWDEY.

Patent of Invention—Re-issues—Enlarging claims—Laches in applying for re-issue.

Action for infringement of patents of invention.

When it appeared that in a re-issued patent a claim constituting a new feature was introduced—a thing that was not in the original patent or contemplated at all by the then inventor, a feature that was shown to be of substantial importance and practical utility, and which amounted to an invention, and it did not appear that the change was the correction of a mistake, or a thing arising by reason of accident or inadvertence,

Held, that the claim in the re-issue was invalid.

Held, that a re-issue cannot contain matter of invention which, with regard to the original, is new, as a broadening of the invention, although it may under proper circumstances contain a broadening of a specific claim made.

When in a re-issue one of the claims was in the same words as one of the claims in the original patent, but contained the words "substantially as shown and described," and on reference to the specifications it appeared that those of the re-issued patent contained certain additions which were not in those of the original patent, and when read with reference to the specifications the claim in the re-issued patent appeared to mean a thing different from that meant by the corresponding claim in the original patent, and the result stated in the new, or added part of the specifications for the re-issued patent showed that the intention was to claim something different from that which was manifested and or claimed in the original patent, and it did not appear that this change could be said to have been made for the purpose of correcting a mistake or by reason of an accident or inadvertence,

Held, that the claim in the re-issued patent could not be sustained, and was invalid.

Where the date of an original patent was 6th December, 1877, and the date of a re-issue of it was 7th March, 1881, and it appeared that the attention of the patentee must have been called to the merits, demerits, and actual scope of his patent as early as 7th March, 1879, by reason of the disclaimer on that date; and where in the case of another patent, the date of the original was 14th November, 1876, and the date of the re-issue 17th March, 1881, and it appeared that the attention of the patentee must have been drawn towards the merits, demerits, or defects in his patent as early as 7th March, 1879, for a similar reason; and where in the case of another patent the date of the original was 28th September, 1879, and of the re-issue 10th July, 1880, and from the correspondence and proceedings respecting the application in the United States, it was indicated that the patentee was not during at least the larger part of this period without having his attention drawn towards the merits, demerits, or defects in his patent, and it also appeared that in each case there had been in the re-issues either the introduction of new invention, or what had been called an enlarging of the scope of the patent, or a broadening of the claim,

Held, that the rule of laches must be strictly applied, and the delay being unaccounted for, the re-issues were invalid—at all events as to the claims in the re-issues which constituted such a broadening and enlarging of the claims in the original patent respectively.

Cassels, Q.C., for the plaintiff.
Osler, Q.C., and *T. S. Plumb*, for the defendants.

IN CHAMBERS.

[BOYD, C., 8TH JUNE, 1885.

THE BANK OF B. N. A. v. THE WESTERN ASSURANCE CO.

Local taxations—Powers of local taxing officers.

The Administration of Justice Act, 1885, has not conferred upon Local Registrars of the High Court the power of taxing Counsel fees to any greater amount than is allowed by the tariff of the 10th September, 1881; and the Taxing Officer at Toronto may still grant fiats for Counsel fees to be allowed on local taxations in proper cases. In this case an appeal from the taxation of the Local Registrar at Brantford was allowed, and the items in dispute were referred to one of the taxing officers at Toronto.

Geo. Tate Blackstock, for the appeal.
Holman, contra.

In re HARNDEN.

Motion to commit for not filing accounts—Personal service—Direction to file accounts.

G. H. Watson moved to commit a party for not filing his accounts as directed by the Master.

Shepley objected that the notice of motion should have been served personally on the party in default, and not on his solicitor, as was done here; *Smith* v. *Marrin*, 4 C. L. T. 493. There was only a verbal direction by the Master, whereas a warrant, or other written direction to bring in the accounts should have been issued.

Watson, in reply. Service on the party's solicitor is sufficient under G. O. 296; and by G. O. 231 a verbal direction is clearly sufficient; the party's solicitor was present when it was given.

The CHANCELLOR said that by the express terms of G. O. 296, which was still in force, service on the solicitor of the party who was in default in not bringing his accounts was clearly sufficient, and G. O. 231 expressly states that a written direction is not required. He therefore overruled the objections.

[26TH JUNE, 1885.

SMITH v. GREEY.

Foreign commission—Issue.

For a foreign commission to be ordered, it is not necessary that the cause should be technically at issue; it is sufficient to show that some issue is raised on the pleadings which must infallibly be tried if the action be tried at all.

Arnoldi, for the plaintiffs.
H. D. Gamble, for the defendants.

[PROUDFOOT, J., 3RD JUNE, 1885.

SMITH v. GOLDIE.

Patent of invention—Action for infringement—Measure of damages—Form of judgment—Pleadings.

In an action for infringement of a patent of invention the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an enquiry, and to be paid the amount found due upon such inquiry for damages sustained from the making, constructing, using, selling or vending to others to be used, by the defendants, and by the persons to whom they have sold, given, or let, the same, of any of the machines, etc. The judgment gave relief beyond what the plaintiffs asked for by their bill of complaint.

Held, that where the language of the decree is unambiguous, the allegations in the pleadings should not be taken into account in the enquiry as to damages, and therefore the Master was wrong in excluding evidence of damages to the plaintiffs by the use of infringing machines by persons who had bought them from the defendants.

Howland, for the plaintiffs.
Cassels, Q.C., for the defendants.

[22ND JUNE, 1885.

In re LAKE SUPERIOR NATIVE COPPER CO.

Appeal—Extending time.

Cross applications in respect of the same subject matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz, the validity of an Act of the Parliament of Canada.

Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.

Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted.

J. H. Macdonald, for the application.
Moss, Q.C., contra.

[ROSE, J., 1ST JUNE, 1885.

WOODRUFF v. McLENNAN.

Judgment under Rule 80—Delivery of statement of claim.

Held, that the practice of moving under Rule 80 for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in some cases it may be allowable.

Under the circumstances of this case, such a motion was refused.

Masten, for the plaintiff.
Holman, for the defendant.

In the Maritime Court.

(Reported by R. Gregory Cox, Esquire, Barrister-at-Law.)

THE CONQUEROR.

Salvage by charterer of vessel salved—Owners insuring themselves—Loss by negligence of charterers' servants—Set-off—Costs.

The Dominion Salvage and Wrecking Company chartered the *Conqueror* from *R. et al.*, the owners, who insured themselves for all insurable risks over five per cent., the Company to make good all repairs, injuries, losses and damages not insurable under the usual policy, and all injuries, etc., up to five per cent of the estimated value of the vessel. Through the negligence of the Company's servants the vessel was sunk, and the Company raised her.

Held, that they were entitled to a lien for salvage; but the Company being largely indebted to the owners, no costs were given.

Held, also, that there is no set-off against a maritime lien except in the case of masters' wages under the Merchant Shipping Act, 1854.

This was a cause of salvage instituted in the Maritime Court at Kingston, by the Dominion Salvage and Wrecking Company, against the steamtug the *Conqueror*, owned by Ross and others of Quebec.

The *Conqueror* ran aground and sank in the river St. Lawrence. She was at the time in the possession of the Wrecking Company, under a charter with Ross and others, the substance of which is set forth in the judgment. After the vessel sank, a great deal of correspondence passed between the Company and Ross and others, showing that the latter contended that the Company was liable for the damage, and that they looked to it to raise the sunken tug. The Company insisted that it was not liable, and that Ross and others, under the charter, were bound to raise the tug.

The answer, filed on behalf of Ross and others, the owners of the tug, charged that the accident occurred through the negligence of the Company and its officers and servants; and further alleged that the Company was indebted to Ross and others in the sum of $4,000 for the use of the tug under the charter, which they asked to set off against the plaintiff's claim, if any.

The cause was heard before C. E. Price, Esq., Surrogate Judge at Kingston.

Smythe and *Whiting*, for the plaintiffs.
Walkem, Q.C., and *R. Vashon Rogers, Jr.*, for the defendants.

PRICE, Sur. J., 17th December, 1884. If was not disputed that the Wrecking Company was entitled to recover reasonable salvage unless prevented by the terms of the charter party, or through the negligence of the Company in causing the loss of the vessel.

The vessel was not a derelict, in my opinion, but was left to the Company to raise, their right of recovery and liability for damages to be subsequently settled.

I have to conclude from the evidence that there was negligence on the part of the officers or servants of the Company, that the agent of the Company here should not have sent the vessel out that night. The night was dark and stormy. The motive was most improper. The captain was guilty of negligence in attempting to pass down beyond the foot of Wolfe Island. I do not say it was wilful, gross, or fraudulent; but he was taking a risk without a purpose. He was acting against the opinion of the pilot. He was exceeding his instructions from the general agent. He was afraid to go into a wharf on account of the condition of the boat's engines, and in preference undertook to run the river upon an unfavourable night, until, caught in darkness and snow, and ignorant of the light being shifted, he ran aground. He certainly was not careful, and to such a degree as may well be called negligence.

Under the agreement or charter entered into on the 27th February, 1883, between Ross and others and the Wrecking Company, it was among other things agreed that the vessel should be navigated by competent persons, and if run after the 20th November, entirely at the Wrecking Company's risk; that the vessel should be at the risk of the owners who should be their own insurers for all insurable risks over five per cent.; but the Wrecking Company should be bound to make good all repairs, injuries, losses and damages which might happen and which were not insurable under the usual policy, as well as all injuries, losses and damages up to the value of five per cent. of the estimated value of the vessel ($20,000). It was further agreed that the steamer should be navigated on the Canadian lakes and rivers, with privilege of using United States ports. The Wrecking Company was to pay for the use of the steamer the sum of $4,000, which should be payable even though she should become damaged, laid up, or totally lost.

The evidence shows that the vessel was navigated by competent persons, and was wrecked on the second or third of November. The effect of the agreement is that Ross and others were insurers against the loss sustained, and cannot relieve themselves any more than an insurance company could against the negligence of the company's servants. This is one of the things a party is insured against under an ordinary policy. It then becomes their duty either to raise the vessel or pay for the same. They did not raise her, but insisted on the Company's doing so.

It does seem hard that Ross and others should suffer, and the Wrecking Company perhaps make money from the carelessness of the servants of the Company, but the Company was paying (or at least undertaking to pay) $4,000 in any event, and taking a risk of five per cent. on the large sum of $20,000, for the season's use of a vessel which the evidence shows

was not worth much over $10,000. Ross and others might have protected themselves by insuring the vessel.

In arriving at the amount of salvage the Wrecking Company is entitled to, I have to consider the risk, the work done, and the value of the property salved. It was late in the season, from 6th to 9th of December, that the work was done. Undoubtedly at this season of the year, the risk to vessels' machinery and men must be greater than in the earlier, usually calmer and warmer, weather. In this case, however, it is reduced to a minimum. The wreck was in the river St. Lawrence, well protected from storms, and where ice does not form early. The work was accomplished and the wreck safely anchored at Garden Island within three days, for which, according to the Company's scheduled prices, they would be entitled to about $1,100, which corresponds with the account filed. The value of the property salved I find to be $7,000. Ross and others were willing to fix the price of raising the vessel at $1,500. I do not think this was an exorbitant figure. It is quite clear from the evidence that other persons would not have contracted to do the work except at a much higher price. It is, however, to my mind, a fair salvage remuneration for the work done, yielding the Company a good profit, even above their schedule of prices and their account made out for work done.

I find that the Wrecking Company is entitled to a lien for $1,500, as salvage for raising the vessel. I also find that the Company was and is indebted to Ross and others for the hire of the vessel in a sum much larger than the salvage allowance. Finding, as I do, that there was negligence on the part of the Company's servants, and that the Company was indebted to Ross and others in an amount against which the Company might have charged its services, and the Company being now in liquidation which will result in a large loss to Ross and others, and inasmuch as the Company sought to take unfair advantage, I do not think I should allow costs.

The set-off is also disallowed on the ground that there is no set-off against a maritime lien except in the case of masters' wages under the Merchant Shipping Act of 1887 (a).

(a) As to negligence of salvors, see *Cargo ex Capella*, L. R. 1 A. & E. 356. As to salvage by charterer, see *The Collier*, L. R. 1 A. & E. 83.

THE OSCAR WILDE.

Towage—Maritime lien—Work done on personal credit—Waiver of lien by taking security.

The fact that towing was done on the personal credit of the owner of a scow,

Held, not sufficient to relieve the scow from a lien for the work done.

The petitioner took an order for the amount of his claim upon one E., who, however, did not accept or pay it.

Held, that he had not waived his right to a lien.

This was a cause of towage. The *Oscar Wilde* was a common scow, without any means whatever of propulsion, towed along the Welland Canal by horses or tugs, and used for carrying wood, sand and other similar freight. It was not registered. The scow was arrested and bail was given; and the cause was heard in due course at St. Catharines before E. J. Senkler, Esq., Surrogate Judge.

T. D. Cowper, for the plaintiff.

R. Gregory Cox, for the defendant intervening.

It was proved at the hearing that Angus Macdonald, the owner of the scow, employed the plaintiff's tug *Doyle* to tow the scow on the canal on her various trips, while engaged in carrying sand from Welland to Montrose Bridge, under a contract between Macdonald and one J. Esson. Plaintiffs admitted that they expected to be paid for the tug's services out of the moneys to be earned by the scow under the contract referred to. Shortly before the towing was completed, an order on Esson for the whole amount then due for towage was given by Macdonald to the plaintiffs, and presented by them to Esson, who, however, did not accept or pay the same.

The order was expressed as follows:—

"WELLAND, Oct. 24th, 1883.

"J. ESSON, Esq.—Please pay tug *Doyle* the sum of ninety-seven dollars, being amount due for towing stone to Montrose Bridge for Michigan Central, and one half trip sand for yourself, in full to date.

$97. (Sd.) ANGUS MACDONALD."

Archibald Macdonald intervened, claiming to be the present owner of the scow. Two of the grounds of defence were that the towing was done on the personal credit of the owner, and that the plaintiff had, by accepting the order on Esson, waived any lien he might have on the scow.

SENKLER, Sur. J., 12th January, 1885.—The mere fact that the work was done on the personal credit of Macdonald would not be a defence, applying the analogy of a case of necessaries; it is immaterial whether the necessaries were furnished on personal credit or not, although the Court will decline to exercise its statutory powers to enforce the payment of the balance due on an ordinary mercantile account between ship-owner and agent. In most cases of this kind (if not all), the tug-owner could sue the person who hires him at law. In this case he could have sued Angus Macdonald. But unless there was some general course of dealing between them which indicated clearly an intention to look solely to Angus Macdonald's personal credit, I do not think the petitioner's right to claim the benefit of the maritime lien could be effected thereby.

The next objection is that the petitioners took a security for their claim and so lost their lien, and the *William Money* (*b*) is cited as an authority for this. The alleged security in this case is the order on Esson. It is an order to pay "the tug *Doyle*," and is not negotiable. I doubt very much if it can properly be called a security; but assuming that it is a security, it is not within the authority of the case cited. In that case the seaman was tendered his wages in full in cash, but preferred as an accommodation to himself taking a Bill of Exchange on the owners, and the Bill being dishonoured by reason of their bankruptcy, he was held to have lost his remedy in the Admiralty Court. "He made his election and must stand by the risk." It is needless to say that the present petitioners had no opportunity of getting cash.

Harcourt & Cowper, proctors for the plaintiff.
A. Williams, proctor for the defendant.

(*b*) 2 Hagg. 136.

THE

CANADIAN LAW TIMES.

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SATISFACTION AND DISCHARGE BY BILLS, NOTES AND CHEQUES.

IT is a general rule of law that one simple contract cannot be satisfied by another similar executory contract. Therefore, by giving a bill or note a debtor does not discharge his liability for which the note is given, but simply suspends the remedy until maturity of the note. The taking of the bill or note amounts to an agreement to give the debtor credit for the time it has to run, but when that period of time has elapsed and the bill or note is in the hands of the creditor, the liability of the debtor on the original debt revives.

Bank notes are a legal tender, unless objected to, and when accepted by the creditor the debtor is released from the debt.

Except in taking up a bill or note a cheque unless dishonoured is payment.

These three rules indicate the effect, generally, of giving a bill of exchange or promissory note, a bank note, and a cheque on a bank (*a*).

The statement that a bill or note *suspends* payment, and that on dishonour the debt *revives* is hardly correct; for if a remedy is merely suspended it continues to exist, but if it is revived, it must have ceased to exist.

(a) Chitty on Bills of Exchange, 11th Ed. pp. 127, 369, 356.

The more exact expression, perhaps, is that a bill or note is a conditional payment of the liability for which it is given and that, on non-performance of the condition, *i. e.*, payment of the bill at maturity, a right of action on the original indebtedness accrues anew.

It is not intended in this article to examine the decisions establishing the above rules, but to review some of the cases establishing exceptions to them, to point out under what circumstances a bill or note is considered as an absolute payment, to point out where a bank note may not be payment, and lastly to discuss those cases holding that a dishonoured cheque may be payment.

If a creditor accepts a bill or note it makes no difference whether the bill or note is given by his debtor or by a stranger. For the same reason that absolute payment made by a stranger and adopted by the debtor is satisfaction and discharge, a conditional payment made by a stranger and adopted by the debtor is as effectual as if made by the debtor himself. In an action for goods sold and delivered (*b*) the defendant pleaded that before action one William Bush (the defendant's father) gave and the plaintiffs took a bill on account of the defendant's liability to pay the causes of action which the plaintiffs had against the defendant in respect thereof. The question here was had a note given *by a stranger* for the defendant's debt the same effect as if the defendant had given it? In delivering judgment Maule, J., said, "If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush for and on account of the debt of another, and the causes of action, in respect of it;

(*b*) *Belshaw* v. *Bush*, 11 C. B. 190.

it must be a payment on behalf of that other against whom alone the causes of action exists: see Co. Litt. 206, *b*. If a stranger in the name of the mortgagor or his heir (without his consent or privity) tender the money and the mortgagee accepteth it, this is a good satisfaction. See also the case of 36 H. 6, reported in Fitzherbert's Abridg't, title Barre, pl. 166. If a stranger does trespass to me, and one of his relations or any other give any thing to me for the same trespass, to which I agree, the stranger shall have of that to bar me; for if I be satisfied this is not reason that I be again satisfied, *quod tota curia concessit*. It appears to us, therefore, that the bill given by Wm. Bush on account of the causes of action by plaintiff against the defendant must be taken as a conditional payment on behalf of the defendant, that the condition to defeat it not having happened it operates as an absolute payment, that it might be adopted and has been adopted by the defendant, who relies on it in his plea; and consequently it bars the action."

If the buyer offer to pay in cash and the vendors take a negotiable security in preference, the security is deemed to be taken as an absolute, not as a conditional, payment (*c*).

In such cases the vendor might have had cash, but he took voluntarily and for his own accommodation a security for money; he has in fact substituted one liability for another and his only remedy thereafter is on the bill.

It is not intended to enter upon the cases establishing this particular branch of law, as the intention of this article is simply to discuss the cases where the giving of these negotiable securities or orders is not only payment but satisfaction and discharge of the debt, where, in short, the creditor has no action either on the security or the original cause of action *as against the debtor*.

"The law requires notice (of dishonour of a bill or note) to be given for this reason, because it presumes that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted or paid he may withdraw them

(*c*) *Marsh* v. *Pedder*, 4 Camp. 257.

immediately. But if he has no effects of the other in his hands then he cannot be injured for want of notice." This is the rule laid down in *Bickerdike* v. *Bollman* (*d*), and approved in *Terry* v. *Parker* (*e*). But in the very cases where *Bickerdike* v. *Bollman* has been acted on, it has been declared that the rule established in that case must not be extended. In *Claridge* v. *Dalton* (*f*), Mr. Justice Le Blanc went so far as to regret that any such decision had ever taken place.

The rule now acted on seems to be that the drawer is entitled to notice, if he had any reason to expect, either at the time of drawing the bill or any time thereafter, that any person other than himself might or would pay the bill, and it does not matter whether that other is a party to the bill or not (*g*).

It would seem then that unless the bill was for the accommodation of the drawer, and no circumstances arose thereafter to lead him to suppose that another would pay the bill, want of notice of dishonour is a good defence to any action on the bill or its original consideration.

We come now to consider the cases where the bill or note given in payment by the buyer is not his own but that of some third person.

In *VanWart* v. *Wooley* (*h*), Irving & Co., in New York, employed VanWart in England to buy goods for them. On account of such purchase they sent to the plaintiff a draft of Cranston of New York, in his favour on Greg & Co., London. Irving & Co. did not endorse it. The plaintiff did not live in London, so he gave the bill to his bankers, the defendants, to attend to, and they sent the bill to Lubbock & Co., their London agents, to present to Greg & Co. At the request of Greg, Lubbock & Co. never presented the bill for acceptance, nor did they protest it, nor give notice to the plaintiff, but presented it for payment when it

(*d*) 2 Sm. L. C. 57, 7th Ed.

(*e*) 6 Ad. & E. 502.

(*f*) 4 M. & S. 226.

(*g*) Cases in 2 Sm. L. C. 59, 7th Ed.; *Carew* v. *Duckworth*, L. R. 4, Ex. 316.

(*h*) 8 B. & C. 489.

became due and on dishonour notified the plaintiff. The plaintiff sued the defendants as bankers and agents, for neglecting to give due notice of the non-acceptance of a bill of exchange which the plaintiff had delivered to them to get accepted; in consequence of which laches the plaintiff alleged that as the payee he was prevented from giving due notice to the drawer, Cranston, and Irving & Co. from whom he had received the bill, and who would have been liable to pay him the sum if they had received due notice, but by the defendants neglect they were discharged and refused to pay, and he had lost his remedy. In giving judgment, Abbott, C. J., said: "If a person deliver a bill to another without endorsing his own name upon it he does not subject himself to the obligations of the Law Merchant, he cannot be sued on the bill either by the person to whom he delivers the bill or by any other. As he does not subject himself to the liabilities we think he is not entitled to the advantages. If the holder of a bill sell it without his own endorsement, he is, generally speaking, liable to no action in respect of the bill. *If he deliver it without his endorsement upon any other consideration, antecedent or concomitant, the nature of the transaction and all the circumstances regarding the bill* must be enquired into, in order to ascertain whether he is subjected to any responsibility."

If the bill is delivered and received as an absolute discharge, he will not be liable, if otherwise he may be. The mere fact of receiving such a bill does not show it was in discharge (*i*).

The plaintiff was in no default to Irving & Co.; he did all that he could have been expected to do when he delivered the bill to his bankers to forward it for presentment. Cranston was insolvent when he drew the bill so he had no right to draw, and he sustained no prejudice. Irving & Co. suffered no loss by the default. Proceeding on the proposition that the nature of the transaction and the circumstances of the particular case are to be considered and regarded, the court held that inasmuch as Irving & Co.

(*i*) *Bishop* v. *Rowe*, 3 M. & S. 362; *Swynward* v. *Bowes*, 5 M. & S. 62.

not having endorsed the bill were not entitled to notice of dishonour, and still remained, as they had in fact not been prejudiced, liable to the plaintiff for the goods, and that the drawer was not entitled to notice as he had no funds in the hands of the drawee; and that the plaintiff was only entitled to a verdict for the amount of the damages he had sustained in being delayed in the pursuit of his remedy against the drawer, and if he could prove no damage, then to nominal damages.

A case in the Court of Exchequer, *Smith* v. *Mercer* (*j*), unless it can be distinguished on the ground that there the facts showed a *pre-appointed mode of payment*, is an authority exactly the other way.

The text writers that have been examined accept the law as there laid down, seemingly ignoring the case just considered. Mr. Benjamin on his work on Sale, however, though following the other writers in the text, refers in his notes to *Van Wart* v. *Wooley*, and the cases therein cited as decisions establishing a different rule.

The facts in *Smith* v. *Mercer* were as follows: the plaintiff sold goods for cash or "approved banker's bills" not exceeding three months date. The defendants paid by an "approved banker's bill," which was dishonoured on presentment for acceptance. They were not parties to the bill and received no notice of dishonour; and in fact the first they heard of its not having been paid was when two months afterwards they received a demand of payment for the goods. In the judgment, Kelly, C. B., said, "In this action they (the plaintiffs) are seeking a remedy against the defendants who were not parties to it, and who had no notice of dishonour. This directly raises the question, whether under such circumstances recourse can be had to the defendants? I am of opinion that it cannot, and although it may be that *the plaintiffs had no option but to take the bill* in the first instance, it being an 'approved bill' and according to the terms of the contract, I think their right to proceed against the defendants was

(*j*) L. R. 3 Ex. 50.

conditional on their giving the defendants notice of the dishonour of the bill. Both on principle and authority if the plaintiffs meant to have recourse to the defendants they should have given them notice upon finding that the bill was dishonoured."

Barons Bramwell and Pigott concurred on the grounds that the plaintiffs might have insisted on the defendants endorsing the bill but did not; that they either took the bill as cash, and if so they had no remedy, or they intended to hold the defendants liable to the same extent as they would have been had they endorsed the bill. "They are liable in the same manner and with the same incidents as if they had been called on, as they might have been, to endorse the bill, *but they are not liable otherwise*, and, therefore, not liable without a notice of dishonour being given to them."

This, seemingly, is in direct contradiction of *Van Wart* v. *Wooley*, and *Swynward* v. *Bowes*, unless it can be explained as suggested in the note to the American edition of the report that the case proceeded on the ground that there was a pre-appointed mode of payment, whereas in those cases there was no pre-appointed mode of payment.

It seems difficult to imagine by what process of reasoning such a reconciliation can be arrived at. The reasoning is, however, met by the case itself, for, as we have seen, Kelly, C. B., says that the defendants are not liable *notwithstanding* the fact that the plaintiff was bound to accept an "approved bill," and not *because* he was so bound.

The case might be supported on the ground that the defendants had been guilty of laches, and by their conduct in not notifying the defendants for two months had led them to believe the bill had been paid, or at least that the plaintiff did not intend to look to them for payment, quite apart from any rule of the law merchant (*k*).

Another case in which a bill or note may become cash in the hands of a creditor is where it has been given as collateral security. It is the duty of the holder to present it

(*k*) See *Warrington* v. *Furbor*, 8 East 242.

for payment, to give notice of dishonour when unpaid, if the debtor is entitled to presentment for payment and notice of dishonour, and to use all due diligence in collecting the money represented by his security (*l*).

This is not a rule peculiar to the law merchant as is the rule established in *Bickerdike* v. *Bollman*, but a rule of law affecting every holder of collateral security of every nature soever, who is affected with a trust, and must use due diligence in its management and make proper exertions to render it effectual.

In *Peacock* v. *Purcell* (*m*), the defendant, being indebted to the plaintiffs in a large sum for goods sold and delivered, sent them in part payment a bill drawn by one Perry, accepted by Angerstein, and endorsed to the defendant by Perry, with the balance in cash. The plaintiffs refused to take the bill in payment, but at the defendant's suggestion retained it as collateral security. When it came due it was not paid, and the plaintiffs neglected to present it or to give notice of dishonour to the defendant. Earle, C.J., said, "The legal effect of taking a bill as a collateral security is, that if, when the bill arrives at maturity the holder is guilty of laches, and omits duly to present it and to give notice of dishonour if not paid, the bill becomes money in his hands as between him and the person from whom he received it." And Byles, J., said, "Assuming that notwithstanding their having taken the bill, the plaintiffs were still at liberty to sue for the debt, it is quite clear that as depositees of the bill, as they had the rights, so they had the duties of holders. *No one else could present the bill;* and as they failed in that duty they discharged the defendant."

In the latest case in Ontario bearing on this branch of the subject, *Synod* v. *De Blaquiere* (*n*), Mr. Justice Proudfoot said, "When mortgages or judgments or securities of this kind are assigned, the assignees are affected with a trust in regard to them, which imposes on them the duty

(*l*) *Camidge* v. *Allenby*, 6 B. & C. 373, 382; *Peacock* v. *Purcell*, 14 C. B. N. S. 728.

(*m*) 14 C. B. N. S. 728.

(*n*) 27 Gr. 549.

of diligence in their management, and in this respect distinguishes them from the remedies the creditor holds under the contract. The latter are held by the creditor solely for his own benefit, and need not be exercised unless he thinks proper. The assignment removing the property from the control of the debtor and placing it within the control of the creditor imposes on him the duty of using proper exertions to render it effectual for the purposes for which it was assigned. The subject has received great attention both in England and the United States, and the decisions in England by which I am bound, recognize this duty to a greater extent and in a more imperative manner than those in the United States. The American authorities do not carry the duty of the creditor to take active measures for the purpose of making the collateral securities taken for the debt available for its payment as far as the English, and it appears to be doubtful if the American cases bind the creditor to take active measures for their collection, either by bringing suit or by issuing execution when they have passed into judgment."

But in every such case in England negligence, though passive, will operate as a defence *pro tanto* to a subsequent suit (*o*).

If a debtor refers his creditor to a third party for payment, and the creditor is offered cash, but for his own purposes and convenience takes a security from the third party instead, such as a bill for three months, he substitutes the liability of the third party for his debtor's, and the debtor is discharged.

In an early case, *Everett* v. *Collins* (*p*), the plaintiff employed the defendant to sell some cattle, and after the sale the plaintiff's son went to the defendant to get the money. The defendant took him to Mingay & Co. who acted as book keepers and sub-agents for him and a number of other salesmen, and desired them to make out the plain-

(*o*) *Capel* v. *Buller*, 2 S. & S. 457; *Williams* v. *Price*, 1 S. & S. 518; *Ex parte Mure*, 1 Cox 68; *Rees* v. *Berrington* in the notes to 2 W. & T. Leading Cases, Am. Ed.; 2 Fisher on Mortgages, 2nd Ed. 807.

(*p*) 2 Camp. 515.

tiff's account. The account shewed £171. 5. 6. due to the plaintiff. Mingay & Co. offered to pay in Bank of England notes but he said a cheque for £170 would suit him better. They accordingly gave him a cheque on Smith & Co., bankers in the city, and the remainder in cash. The cheque was promptly presented but dishonoured; other cheques of Mingay & Co. were dishonoured the same day, as they had greatly overdrawn their account, but they continued to pay at their counter till four o'clock, when they stopped with a balance of defendant's money in their hands larger than the sum in question. The plaintiff then sued the defendant. It was argued for the defendant that the plaintiff should bear the loss, as he had been offered bank notes and by refusing to accept them the defendant had lost the £170 in Mingay's hands. He had preferred the credit of these persons to ready money and must stand to the risk of the security he chose to take. Lord Ellenborough said: "In the ordinary case, if a creditor prefers a bill of exchange accepted by a stranger to ready money from his creditor, he must abide the hazard of the security he takes. But Mingay, Nott & Co. are not to be considered in the light of third persons but as the defendant's servants. When they offered to pay by notes or their cheque that was tantamount to an offer to pay by notes or his cheque. The cheque must be looked upon as his, and there is no pretence for saying that a debtor is discharged by giving a cheque which produced nothing, although payment in cash may have been previously tendered."

This decision is commented on, explained, and distinguished in a late case (*q*), which to the casual reader might appear exactly similar, but is in fact widely different.

The facts in that case were that the defendant being indebted to the plaintiff and other persons in various sums of money had deposited with his bankers, Dobson & Co., a £2,000 bill, which was afterwards paid, to provide for payments that they had to make on his account. The defendants notified his bankers that they were to pay the plain-

(*q*) *Smith* v. *Ferrand*, 7 B. & C. 19.

tiff £193. When the plaintiff applied for payment the defendant gave this order on Dobson & Co., "Please pay Gormersal Mill Co'y. £193 equal to six months." This order entitled the plaintiff to be paid cash, the bankers deducting six months discount. Dobson & Co. offered him cash or part cash and a bill drawn by them on a fourth party. He preferred part cash and the bill which had two months to run for the remainder. This bill was not honoured and the plaintiff sued to recover the amount from the defendant. There was a verdict for the defendant.

In *Everett* v. *Collins* (*r*), the plaintiff took a totally different class of security. He was entitled to cash from the defendant. Mingay & Co. were the defendant's agents; the plaintiff took their cheque (*i. e.* defendant's cheque) which is considered cash, unless not paid. It was an order for prompt payment equal to payment, for an order to pay by cheque or bank note is in effect an order to pay in one species of cash or another. In the case under consideration, Dobson & Co. were not merely agents in the general acceptance of the term, but agents entrusted with funds for the specific purpose of paying these demands; they had *no authority from the defendant to give a security; they were ordered to pay cash.* The plaintiff, therefore, when he took the bill from Dobson & Co. substituted their security and discharged the defendants. Lord Kenyon decided in 1796, that if a debtor refer a creditor to a third person, and the creditor gives the third person an indulgence without the knowledge and consent of the debtor, and the third person becomes insolvent, the loss must fall on the creditor; because as between himself and the debtor the giving indulgence without notice operated as an agreement on his part to look to the third person and discharge the debtor. Here indulgence was given without notice to the defendant where cash could have been had.

Bank notes are a legal tender, unless objected to, and when accepted by a creditor the debtor is released from the debt.

(*r*) Supra.

Bank notes are considered throughout the world as much cash as any other species of currency. Lord Mansfield says, "Bank notes are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind which gives them credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. * * * They are never considered as securities for money but as money itself. On payment by them, whenever a receipt is required, the receipts are always given as for money not as for securities or notes (*s*).

The leading case on bank notes is *Camidge* v. *Allenby* (*t*). There it is laid down that where a vendor receives Bank notes in payment at the time when the goods are sold they operate as actual payment in satisfaction and discharge of indebtness. If indeed the person can shew that the notes were not what they purported to be, *i.e.* if they were forgeries. or that the debtor knew that the bank had suspended, and was aware at the time he gave them that they were worthless, then the creditor would have a remedy against him for the original debt, but not otherwise.

In that case the notes were given not at the time of sale but subsequently, and Bailey, J., draws a distinction on that account. He says, "The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt they operate as a discharge of that debt, *unless* the party who holds the instrument does all that the law requires to be done in order to obtain payment of them. Then the question is, what was the duty of the plaintiff to do in order to obtain payment of these notes? They were intended for circulation. But, I think that he was not bound immediately to circulate them, or to send them into the bank for payment, but he was bound within a reasonable time after he received them either to circulate them or to present them for payment. Now here it is con-

(*s*) *Miller* v. *Race*, 1 Burr. 452.
(*t*) 6 B. & C. 373.

ceded that if there had not been any insolvency of the bankers the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments it became his duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he the plaintiff would resort to the defendant for payment of the notes; and it then would have been for the defendant to consider whether he could transfer the loss to any other person; for unless he had been guilty of negligence he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received no notice of non-payment, or of the insolvency of the bankers, till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff, to give to the defendant notice of the insolvency may have been prejudicial to the defendant." Littledale, J., says: "There is no guarantee implied by law in the party passing a bill or note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed." And both he and Holroyd, J., seem to be of opinion that if bank notes are *paid and received as money* in any transaction of payment that it is payment if both parties are innocent.

The law as laid down in this case, so far as it relates to payment at the time of sale, has been followed in the subsequent cases and is now settled to be as there stated.

The opinion of Bailey, J., as to such payment for a pre-existing debt is not thought to have met the approval of the other Judges in that case, and Bramwell, J., in a subsequent case, without expressly dissenting from that opinion, clearly indicates that he is of opinion that it makes no difference whether the payment is for a pre-existing or present liability (*u*).

(*u*) *Lichfield Union* v. *Greene*, 1 H. & N. 884; and see *Van Wart* v. *Wooley*, supra.

The law seems to stand thus, that if at the time of the transaction the creditor may insist on payment in money and voluntarily takes bank notes, he takes them at his own risk as satisfaction and discharge.

If, however, a creditor takes bank notes for a pre-existing debt they may operate only as a conditional payment to become absolute if on presentment they are paid. But in all cases where the parties are innocent, bank notes operate as satisfaction and discharge, unless the party receiving them does all that the law requires to be done in order to obtain payment of them. He must put them in circulation or present them to the bank for payment the day after he received them (*v*), "or if he do not present them owing to the insolvency of the banker, he must tender them to the person from whom he received them (*w*), and where they have been presented and refused payment, he must give due notice thereof to the person from whom he received them and offer to return them to him (*x*). If, however, the note is not what it purportsto be (*i.e.* is a forgery), or if fraud or knowledge of the banker's insolvency can be traced to the payee, they have no effect whatever.

The payee of a cheque has all the next day after he receives it during which to present it for payment. If he neglects to present it within that time, and the drawer has funds at his banker's sufficient to pay it, and the money is lost, as by failure of the banker, the payee must bear it, for by his neglect he has made the cheque cash as between him and the drawer (*y*). If on presentment the cheque is dishonoured, prompt notice should be given to the drawer, otherwise he may be relieved from the debt. The drawer of a dishonoured cheque is entitled to notice when he has funds sufficient to meet the cheque, or where he might reasonably expect that the cheque would be honoured (*z*).

(*v*) *Camidge* v. *Allenby*, supra.

(*w*) *Henderson* v. *Appleton*, referred to in note *v*, p. 259 Chitty on Bills, 11th Ed.

(*x*) Chitty on Bills, 11th Ed. page 370; *Turner* v. *Stones*, 1 D. & L. 122.

(*y*) See note *z*, Chitty on Bills, 11th Ed. p. 361; *Rogers* v. *Langford*, 1 Cr. & M. 642; *Turner* v. *Stones*, 1 D. & L. 131.

(*z*) *Carew* v. *Duckworth*, L. R. 4 Ex. 316.

The presumption, arising from taking a cheque payable to bearer, and drawn by a third person, upon which the debtor does not put his name, is that the creditor takes it as cash in the same way as if it were a bank note.

In one case (*a*), the defendant bought goods from the plaintiff, paying part in cash and giving for the balance a bank cheque drawn by H. payable to bearer. The plaintiffs presented the cheque early next morning, but there were no funds; and at the end of a week after repeatedly calling upon H., they demanded payment from the defendant. It was held that the plaintiff could not recover. He had taken security of a third party voluntarily at the time of the sale of the goods, and it was to be presumed, at least till the contrary was shewn, that he took it as cash. There was no implied warranty of the solvency of the drawer of the cheque. Although this was the ground of the decision the Court declared that even were it not to be considered as cash then the plaintiffs had made the cheque their own by neglecting to give prompt notice of dishonour to the defendant.

Such a cheque may be considered in the same light as a bank note, once it has passed out of the original payee's hands, and in fact the above case was decided on the authority of *Camidge* v. *Allenby* (*b*).

GEO. LYNCH-STAUNTON.

(*a*) *Redpath* v. *Kolfuge*, 16 U. C. R. 433.
(*b*) Supra.

CREDITORS' REMEDIES AGAINST COMPANIES APART FROM THE PROVISIONS OF THE WINDING UP ACTS.

(Concluded).

Is an allotment of shares and notice thereof to subscribers necessary in order to constitute them shareholders.—The question as to what steps must be taken by the Company in order to make an allotment of stock, and to give such notice thereof to the applicant therefor as will make him a stockholder, and as such, liable to creditors of the Company, was much controverted in the case of *Nasmith* v. *Manning* (*a*). In this case, the action was tried before a judge (without a jury) who found that the defendant subscribed for fifty shares in the stock book of the Company, and that the fifty shares were allotted to him by the Company; and that the Company sent notice to him of calls; and that his name was published in the *Globe* newspaper as a shareholder; and that he was at the time of such publication a subscriber to the *Globe*. The learned judge added that he could not say that the defendant received actual notice of allotment, but he found that the Company by notices sent to his address, gave him notice of their considering him a shareholder. The certificates of allotment were handed by the Secretary of the Company to their broker, who published a notice in a daily paper, signed by the Secretary, notifying subscribers to the capital stock, that the first call of ten per cent. on the stock was required to be paid immediately to them. The defendant never received his certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of the allotment having been made to him.

It was contended on the part of the plaintiff, that upon the defendant subscribing the stock book of the Company,

(*a*) 5 App. R. 126.

there was a complete contract between the defendant and the Company, by which the defendant was to become a shareholder upon the shares being allotted by the Company. But after much conflict of opinion, it was ultimately held by the majority of the Supreme Court, that upon the true construction of the instrument so signed by the defendant he thereby merely offered to become a shareholder, and that before there could be any complete contract between him and the Company, it was necessary for the latter not only to allot the shares to him, but also to give him notice of such allotment. The subscription for shares was written under these words:—"We the several persons firms and corporations whose names and seals are hereunto subscribed, severally and respectively agree to and with the Toronto Grey and Bruce Railway Company, and bind ourselves, our executors and administrators or successors respectively, to become holders of the Capital Stock of the Toronto Grey and Bruce Railway Company for the number of shares of one hundred dollars each and amounts set opposite to our respective names, and upon the allotment by the said Company of my or our said respective shares we severally and respectively agree to pay to the said Company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively; provided always, that no calls shall be made until sixty days shall have elapsed from the time that a previous call was made payable and no call shall exceed ten per centum of the amount subscribed."

Ferguson, Q.C., in arguing the case for the defendant (*b*) said: "If the true construction and meaning of the document signed by the respondent is, that it was not an application for shares, but a subscription without any condition, I must admit the authorities cited by the learned counsel for appellant have great weight; but if is only an application for shares, and that upon the face of the document itself there was something else to be done, it is clear the Company have no right against the respondent until they

(*b*) 5 Sup. Ct. Rep. 424.

do that further act. So I say that upon signing this document respondent did not become *eo instanti* a shareholder" (*c*).

This view of the learned counsel was concurred in by the Supreme Court of Canada, contrary to the views of Ritchie, C. J., and Gwynne, J., who thought that upon the defendant signing the stock book there was a completed contract. The former of these judges said (*d*), "This is not the ordinary case where a person applies for a maximum number of shares, undertaking to accept them or any less number, and the Company is under no obligation to give him any, in which case, I take it, a reply to the application is necessary for the very good reason that when an individual applies for shares in a company, and there is no obligation to let him have any, there must be a response by the Company, otherwise there is no contract (*e*). But in this case the application or offer proceeds from the Company, and the answer comes from the party applied to, who signs the Company's stock book, and who binds himself under seal to become the holder of the number of shares set opposite his name, and on allotment of his shares agrees to pay a certain percentage, &c. The Company allotted the shares and he was placed on the registry, and this constitutes a complete transaction, and made him to all intents and purposes, in my opinion, a shareholder in the company."

Henry, J., on the other hand, points out (*f*) that "When the respondent signed the document in question, the Company existed only by the charter. There were no stockholders or members. Even the provisional directors were not actually such, and could only become so by subscribing and paying for stock. There could be no regular stock book until the shares had been allotted, which is generally

(*c*) See *Smith* v. *Spencer*, 12 U. C. C. P. 277; *Lake Superior Navigation Company* v. *Morrison*, 22 U. C. C. P. 217, 220; *European and North American Railway Co.* v. *McLeod*, 3 Pugs. 3, 34, 35; *Adam's Case*, 41 L. T. N. S. Chy. 270; *Levita's Case*, L. R. 3 Chy. 36; *Davies' Case*, 40 L. J. N. S. Chy. 659.

(*d*) 5 Sup. Ct. Rep. 435.

(*e*) Per Lord Cairns in *Elkington's Case* L. R. 2 Chy. 535.

(*f*) 5 Sup. Ct. Rep. 442.

prepared after the Company is organized, and therefore the document signed by the respondent could not be tortured into one so as to bind the respondent."

The same question arose before Ferguson, J., in *Re Standard Fire Insurance Co.; Kelly's Case* (*g*). In this case the subscription was written under these words: "We the undersigned do hereby subscribe for shares of the capital stock of the Alliance Insurance Company and agree to take the number of shares opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten per cent. of the amount of stock subscribed by us respectively, within thirty days from the date of our several subscriptions." The learned Judge there remarks: "After having examined the authorities referred to, but without being able to reconcile all the statements of the learned Judges appearing in them, I am of opinion that the transaction was one in which stock in the company was offered to Kelly, and that he took it and subscribed for it, and became then a stockholder, and liable to pay the ten per cent. upon his stock at the expiration of thirty days from the date of his subscription; and I think the document that he signed is not, as contended, simply an application for stock, but a subscription for stock; and that he then got the stock as the consideration for his liability." The above citation from the opinion of Henry, J., would seem to show that these remarks can apply only to a case where the subscription takes place after the company has been fully organized, and would not apply to subscriptions made before organization, although made after incorporation of the company.

Section 35 of The Canada Joint Stock Companies Act, 1877, enacts that, "If the letters patent or the supplementary letters patent make no other definite provision, the stock of the company, or any increased amount thereof, so far as it is not allotted thereby, shall be allotted when and as the directors by by-law may ordain," and a similar provision is made by section 34 of The Ontario Letters

(*g*) 7 O. R. 204.

Patent Act. Various authorities bearing upon this clause in the statute are collected in *Stephens on Joint Stock Companies*, at pages 241 to 263.

The use of the words, "so far as it is not allotted thereby," would seem to indicate that the recital usually contained in a charter of incorporation that the charter has been applied for by certain petitioners who have taken stock to the extent mentioned in the recital, does away with the necessity, in so far as these persons are concerned, of any further or other allotment of stock to them.

"When the company have sufficient unallotted original stock in hand to answer the number of shares required, it does not seem necessary to number and earmark the particular shares allotted. A share is defined to be an incorporeal right to a certain portion of the profits of the company (*h*).

"Nor is it material that the name was not entered in the subscription book, nor that there was no specific allotment of stock (*i*).

It would seem that the necessity, or otherwise, for a specific allotment of shares and for notice thereof to subscribers must in each case depend upon the particular terms of the memorandum subscribed to, subject, however, to this proviso, that an allotment may be made by the charter so as to prevent the necessity for any further allotment. Apart from any question of allotment by charter, the necessity for allotment and notice thereof will depend upon the question whether or not the subscription for shares constitutes in itself a complete contract between the company and the subscriber. If the company authorise their agents to offer their shares to the public, then, in the absence of special provisions in the memorandum, the subscription may properly be taken as an acceptance by the subscriber of the offer made by the company; but if on the other hand the transaction is to be treated as an offer on the part of the subscriber to take stock in the company

(*h*) *National Ins. Co.* v. *Egleson*, 29 Gr. 410.

(*i*) *Re Standard Fire Ins. Co.*; *Barber's Case*, 7 Ont. R. 462.

there must be an acceptance by the latter and a notification of such acceptance given by the company to the subscriber before there can be a completed contract. Such case will therefore have to depend upon the particular terms of the memorandum subscribed, and upon the circumstances surrounding the subscription. One of the most important of these circumstances is the time of the subscription; whether it took place before or after the *organization* of the company. In view of the above citation from the judgment of Mr. Justice Henry, it may be that a subscription, which if made after the organization of the company would make the subscriber a shareholder, would if made before organization amount to no more than an offer to take shares, and would therefore require an acceptance and notification thereof on the part of the company.

The necessity for notification to a subscriber for shares that the company has accepted his subscription, where such necessity exists at all, is recognized as well in cases under the Winding up Act as in other cases, and a call upon the shares subscribed for, and notice of such call to the subscriber, is not a sufficient notification of such acceptance by the company, in a case where the call was unauthorised by reason of its having been made by the secretary of the company without the authority of any by-law for that purpose (*j*).

Must the notice of allotment be actual and come directly from the directors. —Another question which arose in the same and was discussed in this case, was as to the sort of notice of allotment which is required in order to complete the contract between the company and the subscribers for shares in those cases where notice is necessary. Henry, J., says (*k*): "Some would appear to think that if the respondent found out through other means than from the directors that they had accepted his application or agreement to take shares it would bind him. I differ with those who say so. If a notice of allotment be necessary in any case, it is

(*j*) *Re Bolt and Iron Co.*; *Hovenden's Case*, 10 P. R. 484.
(*k*) 5 Sup. Ct. Rep. 447.

necessary to come directly from the one party to the other. Whatever the directors did amongst themselves could not bind the respondent, unless by some binding act of theirs on which he could rely, they communicated their acceptance to him of his offer to take the shares." On the other hand, Moss, C. J., delivering the judgment of the Court of Appeal in *Denison* v. *Lesslie* (*l*), affirming the judgment of the Court of Queen's Bench, says: "As is pointed out in the judgment of the Court a formal notice need not be shown; it is only necessary that there should be evidence, whether of conduct or otherwise, sufficient to satisfy the judicial mind that the knowledge of an acceptance of his offer had reached the applicant."

Can a subscriber for shares escape liability on the ground that he has paid nothing on his shares.—In *Denison* v. *Lesslie*, it was contended that as the defendant had never made the first payment of ten per cent. upon the stock subscribed for by him he had never become a shareholder, and was therefore not liable to the plaintiff; but this point is thus disposed of by Chief Justice Moss (*m*):—"It was pressed upon us that by reason of his default in the payment of the ten per cent., the defendant never became entitled to the rights of a shareholder. That is very true, but it does not assist him when he is contending that he is not subject to the same liabilities as a subscriber who had to that extent fulfilled his contract."

Conditional subscriptions and subscriptions coupled with collateral agreements.—Another defence raised in the case of *Nasmith* v. *Manning*, was that at the time when the defendant subscribed for the shares he entered into an agreement with one of the promoters and provisional directors of the Company that the defendant and another should be awarded a certain contract by the Company, and that this agreement was the consideration for the defendant's subscription, and that said contract was never awarded, but it was held (*n*),

(*l*) 3 App. R. 547.
(*m*) 3 App. R. 348.
(*n*) 5 App. R. 126.

that this formed no defence, as the said promoter and provisional director had no power to bind the Company by annexing such an agreement to the defendant's subscription (*o*).

In *Elkington's* case (*p*), Lord Cairns discusses the question with regard to subscriptions given upon the faith of promises, and says: "The real point for determination in this case, might be said to be this—did Messrs. Elkington intend and agree to become members and shareholders *in præsenti* with a collateral agreement as to what should be the effect of their so becoming shareholders? Or, on the other hand did Messrs. Elkington agree that if and when a certain preliminary condition should be performed and not otherwise, they would become members and shareholders" (*q*)?

Under what circumstances may a judgment obtained against a Company be attacked.—Not infrequently a stockholder who is sued by a judgment creditor of the Company, seeks to defend himself upon the ground that the judgment against the Company is for some reason assailable. The rule upon this point is that, "If the judgment is erroneous or irregular only, as long as it remains unreversed it is binding and conclusive upon every one, and the only course is to set it aside on motion. But if the judgment has been obtained by fraud and collusion between the plaintiff and the Company, it is always open to the shareholder to raise the defence by plea (*r*). It is also open to the shareholder to set up the defence that the Company were never served with process in the original action (*s*).

"As between the incorporated Company and the shareholders therein there is such privity as to prevent the

(*o*) See also *Kingston Street Railway* v. *Foster*, 44 U. C. R. 552.

(*p*) L. R. 2 Chy. 511 and 522.

(*q*) See also *Bridge's* case, L. R. 5 Chy. 305. These cases are followed in *Re Standard Fire Ins. Co.*; *Copp, Clark & Co's case*, 7 Ont. R. 448. See also *Turner's case* and *Barber's case*; *Ibid.*

(*r*) Per Burton, J.A., in *Harvey* v. *Harvey*, 9 App. R. 106.

(*s*) S.C. p. 91.

shareholder, when sued, from setting up any defence which might have been pleaded in the original action" (*t*).

As to the extent to which a shareholder after action by one creditor of the Company may prefer another creditor, and the extent to which such shareholder may protect himself against judgment creditors of the Company by himself procuring judgment against the Company, see *Field* v. *Galloway* (*u*).

A. H. MARSH.

(*t*) *Per Harrison*, C. J. in *English* v. *Rent Guarantee Co.*, 7 P. R. 110.
(*u*) 5 Ont. R. 502.

EDITORIAL REVIEW.

Probate Fees and Equitable Conversion.

This subject was discussed in 1 C. L. T. p. 389, under the above title. The propositions there laid down by our learned contributor are as follows:—

I. The Surrogate Courts of this Province should, for fiscal purposes, give effect to the equitable doctrine of conversion, where, upon the application of that doctrine the notional conversion takes place before the death of the owner of the property, whose personal representative is called upon for payment of probate duty.

II. Upon the construction of the act imposing probate duty in this Province a conversion which is directed by the will itself, can in no way affect any question that may arise as to the probate duty, payable in respect of the property devolving under the will.

We believe that the question is still the subject of some discussion between solicitors and surrogate clerks, and that it has been several times referred to the Attorney General for his opinion. The distinction pointed out in the propositions which we have quoted was remarked upon by the Attorney General in an opinion given some time ago; and he has recently given another opinion which we have his permission to publish, the subject being one of general and practical interest. His opinion is as follows:—

"My opinion is that property devised to the executors to be sold or which they are directed to sell is not property devolving within the meaning of that expression in the Schedule to the Surrogate Courts Act. It is not the Probate which gives effect to such a devise. The devise may be so expressed as to make the land personal estate for certain purposes but yet not 'property devolving' within the meaning of the act. The Imperial Acts differ from our statute. On

the one hand the duty is payable on legacies and successions only, and not on the whole personal assets. So much of these as may be required for payment of debts, &c., is not subject to duty. On the other hand the Statutes there expressly subject to duty legacies payable out of real estate. Baron Parke in *Attorney General* v. *Hertford*, 14 M. & W. 292, says that this was first done by 45 Geo. 3, cap. 23, and the provision was continued by the subsequent Statute 55 Geo. 3, cap. 184. The case of *Attorney General* v. *Lomas*, L. R. 9 Ex.29, was founded on these enactments and has no application to our Statutes. The following cases amongst others were considered:—*Forbes* v. *Steven*, L. R. 10 Eq. 178; *Atty. Gen.* v. *Brunning*, 8 H. L. C. 243; *In the goods of Jane Bardon*, L. R. 1 P. & D. 325."

Manitoba Exemptions.

Schemes are being devised in Manitoba for the evasion of the exemptions act which we lately noticed. *The Manitoba Law Journal* says, "a number of Counsel are engaged, we believe, in the preparation of opinions as to whether an agreement to waive the benefit of the clauses of the recent Administration of Justice Act as to exemptions, is or is not valid. There is very little direct authority upon the question in England, and in the United States the cases are in the most perplexing confusion. The practical difficulty seems to be this:—A can license B. to take and sell his (A.'s) goods, but can a license enlarge a statute? If a sheriff seize goods which by the Act are exempt and is sued in trespass, what can he plead? Can he plead anything but his writ—if his writ is that under which he seized? And if he pleads his writ the statute will inevitably defeat him. We venture to suggest that the following words will give the creditor the power which he desires:—'Upon default in payment of any note or renewal, A. B., his executors, administrators or assigns, or his or their agents, may distrain my goods (without any exception or exemption) wherever they may be, and sell the same for the amount in arrear and the expenses of distress and sale.' This docu-

ment, but for the possibility of a breach of the peace in proceeding under it, would obviate all necessity for a judgment. But in practice it would be, no doubt, advisable to procure execution, and when placing it in the sheriff's hands give him a warrant under the license. He can then justify his seizure both under the writ and the license. That such a power to take goods is perfectly good, will be apparent by considering that it is contained in almost every real estate mortgage. The point is worked out with another view in an article upon 'Distress', 1 Man. L. J. 33."

Probably, the simplest way for a merchant to protect himself is to stipulate, on a sale of goods, that the property shall not pass until payment has been made in full; taking from the purchaser also a license to enter on his premises and remove the goods on default. We believe that there is no statute in Manitoba similar to the Nova Scotia statute which makes such agreements void unless registered; R. S. N. S. 5th Series, cap. 92, sec. 8. But even with such a law in force the only safety to a vendor is to retain property in the goods at all hazards until he has been paid.

Damages for Defective Drains.

The *Law Times* mentions a Nisi Prius decision of vast importance to tenants. The action was brought by a tenant against his landlord on a fraudulent misrepresentation as to the drains of the house. The plaintiff's wife was taken ill and died from the illness, which was brought on by the filthy condition of the drains, which were not as they had been represented. The plaintiff had a verdict. It appears that his wife had a life income of £1000 a year which she had been in the habit of handing to the plaintiff. Mr. Justice Day directed the jury to assess the reasonable expectation which the plaintiff would have had of enjoying his wife's income during his life, and the jury gave him the sum of £2000. The *Law Times* says, "If the principle is that a defendant is to be held liable for all consequences which may reasonably be expected to follow directly from his wrongful act, the direction would seem to have been

right. The representaion being made for the purpose of inducing the plaintiff to occupy the house, it did not. require a very deep perception of cause and effect to foresee that the death of some one or more of the family is extremely likely to result from a fractured soil pipe immediately outside the front door and a defective trap discharging sewer gas into the library window."

Such representations are not usually made, tenants, for the most part, taking houses as they find them; but *if this* state of the law be the true one, and if it becomes generally known, a warranty as to the state of the house will always be asked for. To refuse it would be to lose the tenant and we may therefore conclude that it will be given as a matter of course when asked for.

A Married Woman's Undertaking.

In a recent case, *In re Prynne*, noted in the Weekly Notes, 4th July, 1885, at p. 144, Mr. Justice Pearson has held that a married woman's undertaking as to damages will be accepted on granting an injunction to her, although she may be restrained from anticipating her income. It appears that the Registrar refused to draw up the order on the sole undertaking of the married woman, and an application to the court was the consequence. Pearson, J., is reported to have held that "the sole undertaking of the married woman must be accepted. He repeated what he said in *In re Andrews* (p. 142 of same issue of W. N.) that the restraint on anticipation is the creation of a Court of Equity for the protection of a married woman, but it does not prevent the court from saying that under the circumstances of a particular case she is not entitled to the protection. If her undertaking was not sufficient, she ought to be required to sue by a next friend, and his lordship could not see that he had any power to require that."

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 30th January, 1885.

REGINA v. RICHARDSON.

Information—Conviction—Police Magistrate reserving case for High Court—Removal of Proceedings—New trial—Constitutional law.

Held, that a Police Magistrate cannot reserve a case for the opinion of the High Court under Consolidated Statutes U. C. cap. 112, as he is not within the terms of that act.

Held, also, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a Police Magistrate or a Justice of the Peace, after conviction, or at any time, for the purpose of moving for a new trial, for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. But,

Held, that even had a motion been made to quash the conviction in this case, and an order nisi applied for, for a mandamus to the magistrate to hear further evidence, which he had refused, both motions would have been discharged; the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere.

The court declined to hear discussed the question whether the magistrate in this case, if appointed only by the Ontario Government, was legally or validly appointed; his patent from the Ontario Government only being produced and it not appearing that no commission by the Dominion had issued to him, nor that any search or enquiry had been made at the proper office as to the fact; the only other evidence as to the appointment, besides the mere production of his Ontario Patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or the Governor-General of the Dominion and that he knew this "of common and notorious report."

Held, also that the information in this case was not objectionable for not setting out the false pretences by which the defendant was convicted, as it was in the form in which an indictment might have been framed, and moreover the objection was met by 32-33 Vict. cap. 32, sec. 11, and by cap. 31, sec. 67.

Irving, Q.C., for the Crown.
Dickson, Q.C., contra.

BECKETT v. G. T. R. CO.

Railway Company—Track not fenced—Unlawful rate of speed—Accident—Contributory negligence—Common law liability—Life policy—Deduction from damages.

The plaintiff's husband was driving in his waggon along the highway in the town of Strathroy where it crossed the defendants' line of railway, which was there unfenced. As he approached the track he did not observe any stir among the railway employés or others there, or any other signs indicating the approach of a train. There was a curve in the line about a mile to the westward where a train could not be seen, and there was strong evidence that the view which he might have had for some distance westward was obstructed partly by cars placed by the railway employés on the side tracks, and partly by a baggage house and other obstructions, so that he could not see far enough to enable him to avoid a train running at the rate of thirty-five miles an hour, as the defendants' train was at the time. The train in question was a fast train but recently established. While there was no direct evidence that he had ever seen it passing through the town or that he knew of it, there was apparently credible evidence that after the locomotive came within hearing distance there was no sound of bell or whistle until it was so near the crossing that there was only time for two short, sharp whistles, when the collision with the waggon took place, which caused the death of the plaintiff's husband and the destruction of both horses and waggon. The alleged obstructions and the neglect to ring the bell or sound the whistle were strongly controverted by defendants' witnesses. The evidence for the defence rather corroborated the plaintiff's witnesses in those respects. The jury found for the plaintiff.

Held, that it was altogether a case for the jury, and as it was fairly presented to them, and upon questions fairly put them which they had answered, finding in the plaintiff's favour, the Court would not interfere with their finding.

Held, also, that there was no contributory negligence on the part of the deceased.

Per O'Connor, J. The defendants, under the circumstances appearing in this case, were not only liable in damages but to a criminal prosecution as well.

Per Wilson, C.J. Independently of any statutory enactment on the subject, the defendants were running their train too rapidly for the public safety at the place in question, and they must be governed by the same rules which govern ordinary vehicles and teams using roads which meet and cross each other; each, while providing for its own safety, also providing for that of others, and each having the same rights and privileges as, but no higher than, the other.

Held, also, Wilson, C.J., dissenting, that a policy of insurance on the life of the deceased for $3,000 had been improperly directed by the learned Judge at the trial to be deducted from the damages assessed by the jury.

Per Wilson, C.J. The whole of such policy should be deducted; but in any event, such deduction should be made as would represent the probable premiums payable had the deceased lived, as also for the interest upon such premiums.

Meredith, for the plaintiff.

Bell, *Q.C.*, and *Osler*, *Q.C.*, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 27TH JANUARY, 1885.

BLAGDEN v. BENNETT.

Slander—Privileged occasion—Malice.

The plaintiff, a school trustee, in connection with another trustee, acting under the authority of the board purchased a quantity of firewood for use in the school house. In December shortly before the municipal and school trustee elections, the defendant, a rate-payer, and another school trustee were discussing the taxes when the defendant said that they had paid too much for the wood; that the plaintiff had culled the wood and had sold the best of it and had drawn the culled wood to the school house; and on H. remonstrating with him, he said, "Oh! but he did and I can prove it"; that he could prove it by a person named N. Subsequently on Christmas Eve, the defendant and B., a rate-payer, and

auditor of the school accounts were discussing municipal matters, and related a conversation he had had with N. who was a municipal councillor, that while the municipal taxes were lower the school taxes were higher; that W. had said the wood was No. 2, and it must have been culled, as No. 1 had been bought. It appeared that the plaintiff, at the time he purchased for the school board, had purchased other wood from the same person on his own account, which he sold. In an action of slander,

Held, Rose, J., dissenting, that the words were spoken on privileged occasions, and there being no evidence of malice, there could be no recovery.

Carscallen, for the plaintiff.
Osler, *Q. C.*, for the defendant.

McNEELY v. McWILLIAMS.

Contract in writing—Parol evidence to explain.

The defendants wrote to the plaintiffs, "we will furnish scows and deliver all the stone required for the Omemee bridge as fast as you require them, for the sum of 70c. per cubic yard"; to which the plaintiffs replied, "we accept the above offer on the price and conditions named."

Held, Cameron, C. J., dissenting, that parol evidence was admissable to show that the delivery was only to take place, provided that the water along the route was high enough to enable the defendants to use their steamers in towing the scows.

Geo. Tate Blackstock, for the plaintiffs.
Osler, *Q.C.*, for the defendants.

BANK OF MONTREAL v. DAVIS.

Voluntary conveyance—Fraudulent preference—Evidence—Finding of Judge on weight of evidence.

In an action to set aside conveyances from a father, a merchant, to his two sons, as made with intent to delay or defraud his creditors, it was found as a fact that, at the time in question, the father was in solvent circumstances, and owed no debt unpaid at the time of the action, except a sum of $1,000 to his wife for rent. It appeared that the wife had joined in the conveyance to the sons.

Held, that the action must fail.

The court refused to interfere with the finding of the learned judge who tried the cause on the weight of evidence, though they felt a difficulty in arriving at the same conclusion.

A. Bruce, for the plaintiffs.
Robertson, Q.C., for the defendants.

DYMENT v. THOMPSON.

Sale of goods—Place of inspection—Acceptance of part—Cross-action for damages.

The plaintiff, a lumber dealer and mill owner, agreed with the defendant to supply him with certain grades of lumber to be shipped on board cars at the station nearest to the plaintiff's mills, and to be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which the defendant accepted and some of which he rejected.

Held, that the plaintiff had the right of inspection at Hamilton, but having accepted certain of the car-loads, he had no right to reject the others, because part did not answer the contract, unless the lumber they contained was so inferior in quality as to destroy the distinctive character of the whole of such carloads, but that the defendant must rely upon his action for damages, or give the loss in answer *pro tanto* to the claim.

McCarthy, Q.C., and *Pepler*, for the plaintiff.
Lount, Q.C., and *Kappelle* for the defendant.

ILER v. ILER.

Implied contract—Relatives.

When brothers or sisters, or other near relatives live together as a family, no promise arises by implication to pay for services rendered or benefits, which as between strangers would afford evidence of such a promise; and so in an action between relatives so living together for board or wages or the like, an express promise or agreement to pay must be proved by the party making the claim.

Aylesworth, for the plaintiff.
Pegley, for the defendant.

YOUNG v. NICHOL.

Malicious prosecution—Issuing search warrant—Reasonable and probable cause—Belief—Question for Jury.

A robbery was committed at the defendant's shop, and an account due by the plaintiff to the defendant was found immediately afterwards lying near by, which from its crumpled appearance seemed to have been carried about in some person's pocket for some time. From this, the defendant suspected some one in the plaintiff's house, and he caused a search warrant to be issued and the plaintiff's house searched, but found nothing. It appeared that the account which was found had never been sent to the plaintiff, but a similar one had been sent. The defendant swore that when he found the account, he had forgotten it had not been sent to the plaintiff. In an action for malicious prosecution the learned judge entered a verdict for the defendant, holding that the plaintiff had failed to show that the defendant acted without reasonable cause.

Held, that the question of the defendant's belief in the delivery of the account to the plaintiff was for the jury, and therefore there should be a new trial.

Held, also, that an action of malicious prosecution will lie for *issuing* a search-warrant without reasonable or probable cause.

Lount, Q.C., for the plaintiff.
McCarthy, Q.C., for the defendant.

JEFFERY v. HEWIS.

Assessment and taxes—Invalid assessment—Sale of land for taxes.

In the year 1875 a certain lot containing 200 acres and patented as one lot was assessed on the resident roll as lot 114, 200 acres, valued at $1,000. From 1876 to 1878 it was similarly assessed. In 1879 it was also so assessed and at the same rate as in the previous years, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant, who duly paid the taxes for each year, including 1879. On the non-resident roll for 1879 the east half of the lot appeared as assessed at 100 acres, valued at $800. By reason of the land so appearing on the non-resident roll it was returned to the County Treasurer as in arrear for the taxes of 1879, and a sale was made thereof.

Held, that the assessment was an assessment of the whole lot, and the taxes having been paid on the whole lot, the error of putting the east half on the non-resident roll could not affect the owner's right to the land, and the sale was therefore invalid.

H. H. Strathy, for the plaintiff.
O'Sullivan, for the defendant.

In re THE BELL TELEPHONE CO.

Patent of invention—Minister of Agriculture—Jurisdiction in disputes as to patent becoming void—Certiorari.

Held, that the minister of agriculture, or his deputy, has jurisdiction under section 28 of The Patent Act of 1872, to decide any dispute as to whether a patent has become void for non-observance or violation of the provisions of that section.

Semble, that a private person has the right to question the validity of a patent before the minister or his deputy, and that the intervention of the Attorney-General is not necessary.

Semble, also, that the minister's duties are not judicial, and therefore his decision cannot be reviewed in a court of law.

Held, that the minister is not required, in proceeding under the above section, to examine witnesses under oath, or to grant summonses for the attendance of witnesses.

Quære, whether, if the minister's duties are in fact judicial, the Provincial Courts have jurisdiction to question his decision, he being, on that assumption, a Federal Court.

An application for a writ of certiorari to bring up all proceedings before the minister on an application to have declared void the patent of the Bell Telephone Company was therefore refused.

Lash, *Q.C.*, and *S. G. Wood*, for the motion.
Arnoldi and *J. R. Roaf*, contra.

JACKSON v. STALEY.

Libel—Publication, evidence of.

The plaintiff had been a servant of the defendant, and, on leaving the defendant's service, asked for an account of the amount of wages due him. The defendant then made out an account as follows:—"Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the following:—"Stole hay during winter, $4.00," and "Stole one hatchet hammer, $1.50." The account was placed in an open envelope and handed to M., the plaintiff's present employer, who took it to the plaintiff's house. The plaintiff's evidence was that M. put the envelope on the table between the plaintiff and his wife while they were at a meal; his wife took up the envelope, and taking out the account read it to her husband, who could neither read nor write. It was not proved that M. had read the account,

and he was not called as a witness. Some evidence was given of M.'s knowledge that the plaintiff could not read. In an action of libel on the account,

Held, that there was no evidence of publication.

McIntyre, Q.C., for the plaintiff.

Britton, Q.C., for the defendant.

WILKINS v. McLEAN.

Foreclosure—Misrepresentation—Accounting.

H., a mortgagee, by representing to the persons owning the equity of redemption that the property was not worth the amount of the mortgage, induced them to part with their estate; and afterwards sold the land at a large profit.

Held, that H. had acquired the equity of redemption as a trustee, and was bound to account for the proceeds of the sale.

Moss, Q.C., for the plaintiff.

Cassels, Q.C., for the defendant.

BRASSERT v. McGIVEN.

Sale of goods—Statute of Frauds—Contract in writing.

After certain goods had been sold and delivered it was discovered that the consignee was in embarrassed circumstances. After negotiations between the consignor's agent and the consignee, the consignee offered in writing to hold the goods subject to the consignor's order, which offer was not accepted in writing by the consignor. An assignment for the benefit of creditors was shortly afterwards made by the consignee. The consignor then demanded the goods from the trustee, and on his refusal to deliver them, brought trover.

Held, that there was no valid agreement to return the goods within the Statute of Frauds.

E. H. E. Eddis, for the plaintiff.

George Kerr, Jr., for the defendant.

McARTHUR v. COLLINGWOOD.

Municipal corporation—Negligent construction of drain—Damage to property —Arbitration.

The defendant injured the plaintiff's property by improper and negligent construction of a drain. The learned Judge who tried the case entered judgment for the defendant, holding that the case was one for arbitration under the Municipal Act.

Held, that it was not a case for arbitration, but that the action had been properly brought, and a new trial was directed with costs.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

BAKER v. JACKSON.

Judgment—Order to hold to bail — Judgment against bail — Damages, amount of.

In an action of damages, the damages were assessed at $400, and costs taxed at $125. A Judge's order to hold to bail having been obtained a recognizance for $300 was taken in the statutory form. Judgment was entered against the bail for $525 and costs of suit.

Held, Cameron, J., dissenting, that the judgment should be reduced to $425 and costs of suit.

Lash, Q.C., for the plaintiff.

Wm. Douglas, for the defendant.

GORING v. LONDON MUTUAL FIRE INS. CO.

Fire Insurance—Buildings and contents—Title to land—Incumbrance—Misrepresentation as to title—Materiality—New trial.

In an action on two fire policies on buildings and their contents, by which the applications therefor were made part thereof, it appeared that the insured property had been conveyed to the plaintiff by his father, in consideration of natural love and affection, subject to a condition that

the son should maintain his father and brother. In the applications and proof of loss, the plaintiff stated that the property was held in fee simple unincumbered. By the first statutory condition if the insured misrepresented or omitted to communicate any circumstance material to be made known to the Company to enable them to judge of the risk, the insurance should be void as respects the property misrepresented.

Held, that the statement as to the property was a misrepresentation merely, and its materiality was a question for the jury; and, in any event, the misrepresentation would apply to the buildings only and not to the chattels; and the learned Judge who tried the case having directed a verdict to be entered for the defendants on the ground that the untrue statement of itself vitiated the policies, a new trial was ordered.

Held, also that the 15th statutory condition, which provides that "any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim," did not apply, as that condition only refers to the particulars in the statutory declaration required by condition 12, subsections (*c*) to (*e*).

Osler, Q.C., for the plaintiff.
Moss, Q.C., for the defendants.

GARLAND v. THOMPSON.

Action on promissory note—Defence and counter-claim of fraud in obtaining note—Judgment for plaintiff—New trial on counter-claim.

To an action on a promissory note the defendant counter claimed that the note was given in part payment of the purchase money of land in Manitoba, which he alleged the plaintiff had induced him to purchase by fraud and misrepresentation. The jury found the amount of the note, and that the defendant had sustained damage on the purchase by reason of the plaintiff's fraud to the same amount. Judgment was entered for the defendant on the finding.

On a motion to set aside the judgment, the Court were of opinion that the finding as to the fraud was not satisfactory, and they ordered a new trial on the counter claim; but they thought that the plaintiff should not be delayed in his recovery upon the note and directed judgment to be entered therefor.

Guthrie, Q.C., for the plaintiff.
Osler, Q.C., for the defendant.

GLASS v. CAMERON.

Judgment—Amendment affecting stranger—Setting aside amendment at instance of stranger—Locus standi.

An order was made by the Master in Chambers amending a judgment entered against C., as executrix, so as to make it a judgment against C. personally. The order for the amendment was made *nunc pro tunc*, upon the allegation that all parties interested consented, and that a prior execution at the suit of the M. Co. against C. personally had expired. The M. Co. then applied to set aside the order for the amendment, because their writ had not expired but was in full force, and the effect of the amendment was to give the plaintiff priority over them, and an order was made by the Master in Chambers accordingly.

Held, Cameron, C.J., dissenting, that the M. Co., though strangers to the action in which the amendment was made, had a *locus standi* to apply to have the order for the amendment set aside.

Osler, Q.C., for the appeal.
Richards, Q.C., contra.

[ROSE, J.

ROBBINS v. COFFEE.

Replevin—Pleading.

In an action of replevin the first count of the statement of claim charged the defendant with taking certain goods on the premises known as the "Creemore Woolen Mills"; and the second count with taking certain goods on the premises known as the "N. & N. W. R. Station at the said Village of Creemore." The defendant pleaded that one W. was tenant to the defendant of certain premises in said village known as "Block B.," and certain other premises known as the "Langtry Block," that rent was in arrear, and because of such arrears of rent the defendant well avowed the taking of the said goods on the said premises and justly, etc., as a distress for the said rent which still remained due and unpaid

Held, on demurer a bad plea.

Thomson, for the demurer.
H. H. Strathy, contra.

REGINA v. ARSCOTT.

Vagrant Act—Construction of.

The Vagrant Act, 32-33 Vict. cap. 28, declares certain persons or classes of persons to be Vagrants, amongst others, "all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves.

Held, that the Act does not, on its true construction, declare that being a prostitute, etc., makes such person liable to punishment as such; but only when found at the places mentioned in the Act under circumstances suggesting impropriety of purpose, and who, on request or demand are unable to give a satisfactory account of themselves.

Osler, *Q.C.*, and *Meredith*, *Q.C.*, for the applicant.

Aylesworth and *McKillop*, contra.

VANDEWATERS v. HORTON.

Mortgage Action—Costs.

In selecting a form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant; and when a simple inexpensive mode of procedure is open and a more expensive and burdensome course is adopted, it must be at the peril of costs.

The practice of bringing an action for an amount due on a mortgage within the jurisdiction of a Division Court in the High Court by making a claim for possession of the land is one that must be carefully guarded; and except in cases clearly indicating the necessity of proceeding in the High Court, no costs will be given to the plainiff.

In this case the amount claimed as due on the mortgage was within Division Court jurisdiction, and there were no special circumstances showing the necessity for bringing the action in the High Court, and costs were refused the plaintiff.

Simpson, for the plaintiff.

Burdett, for the defendant.

DONELLY v. DONELLY.

Husband and wife—Wife's separate trading—Interference of husband—Injunction.

The plaintiff, a married woman, carried on business as a hotel-keeper, and owned chattels in the hotel. The defendant, her husband, interfered by taking the receipts, giving orders to servants, and maltreating the plaintiff.

An injunction was granted to restrain the defendant from interfering with the plaintiff in her business, or with her servants or agents, or with the business, and from removing from the hotel any of the chattels belonging to the plaintiff.

Semble, that an injunction might also have been granted to exclude the defendant from the hotel under the circumstances.

W. R. Riddell, for the plaintiff.

WILSON v. WOODS.

Slander—Justification—Pleading evidence in mitigation of damages.

In an action of slander the statement of claim set out that the plaintiff was a solicitor, and as such was retained and instructed by one S. to let certain farm lands and collect the rents for S., and the defendant falsely, etc., spoke and published of the plaintiff, that he, S., could not get anything from the plaintiff who had been collecting the rent for S.; he had never made any return to S., he had used all the money himself, he had robbed him of the whole obtained.

The defendant denied all the allegations in the statement of claim, and in the second paragraph of his defence he pleaded, that, if the plaintiff established that the defendant spoke, etc., the words charged or any of them, the defendant in mitigation of damages said that, etc., justifying the words spoken.

Held, on demurrer to the second paragraph of the defence that it was a good plea, setting out, as it did, facts in justification; and if the defendant chose to restrict the plea to the mitigation of damages he was entitled to do so.

W. H. P. Clement, for the demurrer.

Aylesworth, contra.

CHATTERTON v. CROTHERS.

Building contract—Action for balance due—Penalty for delay—Liquidated damages.

To an action for a balance due upon a building contract, the defendant pleaded that the plaintiff agreed to build a house by a certain day named "under a penalty of $5 per day," to be paid by the plaintiff to the defendant for each day on which the work remained unfinished after the day named.

Held, on demurrer a good defence; the penalty named being in fact liquidated damages.

Lash, Q.C., for the demurrer.
McIntyre, Q.C., contra.

CHANCERY DIVISION.

[FERGUSON, J., 4TH JULY, 1885.

WESTGATE v. WESTGATE.

Costs of Official Guardian—Fraud by infant.

The Official Guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action.

Meredith, Q.C., for the plaintiff.
R. Meredith, for the adult defendant.
Lash, Q.C., for the Official Guardian.

GRAHAME v. BOLTON.

[6TH JULY, 1885.

Will, construction of—Conditional gift—Condition becoming impossible—Vesting—Gift over—Time of payment.

A testator bequeathed his chattels and $1,500 to his widow. His estate he directed to be sold and the $1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded, "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my only son shall become 21. 5. It is

my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain and suitably provide for my said son until he shall become 21. 6. It is further my will that on the coming of age of my said son my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies. 7. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled shall be paid over to my two eldest brothers." The son died under twenty-one.

Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition.

Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained 21 if he had lived; and in the meantime the widow was entitled to the income.

Jeffreys, for the plaintiffs.
Meredith, *Q.C.*, and *R. Meredith*, for several defendants.

IN CHAMBERS.

[OSLER, J. A., 25TH JUNE, 1885.

HEWITT v. HEISE.

Adding parties—Rules 103 (*a*) *and* 108.

The plaintiff and one Pegg both claimed to be entitled to the principal and interest due upon a mortgage made by the defendant. The defendant paid Pegg one gale of interest and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff sued, claiming the gale of interest which the defendant had paid to Pegg, and the principal as upon default of payment of interest. The defendant applied to have Pegg added as a co-defendant, under Rule 103.

Held, not a proper case for adding Pegg as a party under Rule 103 (*a*), but rather one in which a notice might be served upon Pegg by the defendant under Rule 108.

Quære, per the Master in Chambers, whether the defendant might not have a remedy by interpleader.

E. B. Brown, for the motion.
Aylesworth, contra.

[FERGUSON, J., JUNE, 1885.

CANADIAN LAND AND EMIGRATION CO. v. THE TOWNSHIP OF DYSART.

Appeal to Supreme Court of Canada—Payment out of Court—Discretion of Court.

The plaintiffs appealed to the Supreme Court of Canada from a judgment of the Court of Appeal. The defendants applied for payment out of Court to them as the successful parties in the action, of a sum of $5,000 paid in by the plaintiffs, and representing the whole subject matter of the litigation.

Held, that the application was in the discretion of the Court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and the application was therefore refused, following *King* v. *Duncan*, 9 P. R. 61.

W. H. Lockhart Gordon, for the plaintiffs.
W. H. P. Clement, for the defendants.

[ROSE, J., 2ND JULY, 1885.

COPELAND v. THE TOWNSHIP OF BLENHEIM.

Costs of trial where jury disagree—Rule 428.

The action was tried twice. At the first trial the jury disagreed, but at the second there was a verdict for the plaintiff, which was sustained by a Divisional Court.

Held, that the costs of the first trial were properly taxable to the plaintiff, as part of the costs which should follow the event mentioned in Rule 428.

Langton, for the plaintiff.
Holman, for the defendant.

[3RD JULY, 1885.

McGARVEY v. THE TOWN OF STRATHROY.

Costs—Scale of.

An order in Chambers referred the action, which was in the High Court, to the Master at London, to assess the damages and to tax the costs to whichever party was successful in a certain appeal. There was

no trial of the action and no judgment was entered. The Master assessed the damages at $60 and taxed to the plaintiff, who succeeded in the appeal, his costs upon the High Court scale.

Held, on appeal, that the Master had no power under the order to determine upon what scale the costs should be taxed, and therefore he was right in taxing upon the scale of the court in which the action was brought.

Aylesworth, for the appeal.
Folinsbee, contra.

[11TH JULY, 1885.

DUNCAN v. TEES.

Interpleader—Material upon which order granted—Who should be plaintiff in issue.

Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the execution creditor.

A sheriff, instructed by the execution creditors, went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this and without further inquiry made a seizure. Upon a claim to the goods being made, the Sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure.

Held, that an interpleader order should not have been granted, and an order was made barring the execution creditors.

Semble, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue.

Shepley, for the claimants.
Akers, for the execution creditors.
Aylesworth, for the Sheriff.

[4TH JULY, 1885.

CANADA LIFE ASSURANCE CO. v. NUTTAL.

Allowing service out of jurisdiction—Making and breach of contract—Setting aside proceedings—Rule 45.

The defendant was the agent of the plaintiffs in British Columbia, and his duty was to remit the balances of premiums received to the plaintiffs' head office at Hamilton. The action was brought to recover sums of

money which should have been but were not so remitted by the defendant. The contract under which the defendant became the plaintiffs' agent was made by correspondence. On the 5th of November, 1884, the plaintiffs wrote to the defendant, naming the amount of the guarantee bond required, and stating what expenses they would pay in addition to the commission allowed. On the 29th November the defendant answered by letter accepting the agency, and that letter closed the correspondence.

Held, that the final assent to the contract made between the plaintiffs and the defendants having been given in British Columbia, the contract was not "made or entered into within Ontario," and service of the writ of summons effected on the defendant in British Columbia could not therefore be allowed under Rule 45 (b).

The defendant's instructions were to remit to Hamilton all balances by the last day of each month, and it was admitted that the defendant had always previously remitted by a bank draft from British Columbia.

Held, that the defendant's breach of duty was in not remitting by post or in the usual way, which would have discharged him, and therefore that there was no breach of contract within Ontario, and service could not be allowed under Rule 45 (c).

Quære, per Rose, J., whether it was necessary or proper to set aside the writ of summons, statement of claim, and service, in addition to refusing to allow the service.

J. A. Culham, for the plaintiff.
MacKelcan, Q.C., for the defendant.

[10TH JULY, 1885.

PURSLEY v. BENNET.

Mitigation of damages—Action for malicious arrest—Pleading and evidence.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour, that the plaintiff was avoiding arrest, that the defendant therefore watched him, and when he endeavoured to escape, detained him until the arrival of the constable and then gave him into custody, and that the defendant did this in the *bona fide* belief that he was justified in thus aiding the arrest.

Held, that although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record.

Aylesworth, for the plaintiff.
H. J. Scott, Q.C., for the defendant.

[THE MASTER IN CHAMBERS, 4TH JULY, 1885.

TAYLOR v. COOK.

Judgment against partnership—Admission by one partner—Rule 322.

The statement of one partner on his examination in a suit against the firm, as to transactions which occurred during the partnership, binds all the partners, unless they seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to.

Leave was granted, under Rule 322, to sign judgment against the defendant partnership upon admissions in the examination of one partner.

Watson, for the plaintiff.

Ogden, for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

SMALL v. BELYEA.

Carrier—Steamboat owner—Loss of goods—Action for—Negligence—Onus of proof—37 Vict. cap. 25 (D.)—Effect of—Evidence—Rebuttal—Hearsay—Statement by master regarding cause of accident—Evidence admitted without objection—New trial.

In an action against the owner of a steamboat as a common carrier, for the loss of goods, the plaintiff proved the delivery of the goods to the defendant, and their non-delivery at the place of destination. The defendant then (without objecting that the plaintiff had given no evidence of negligence), called witnesses to disprove negligence, and the plaintiff gave evidence of negligence in reply.

Held, per Allen, C.J., Weldon, Wetmore and Fraser, JJ., Palmer, J., dissenting, 1. That no such objection having been taken at the trial, the defendant could not afterwards move to enter a non-suit on the ground that the plaintiff had not given any evidence of negligence in his *prima facie* case. 2. That the plaintiff having relied in the first instance on the receipt of goods by the defendant, and their non-delivery at the place of destination, was properly allowed to give evidence of negligence in answer to the case set up by the defendant.

Quære, whether the Statute 37 Vict. cap. 25 (D.) has changed the onus of proof in actions against carriers for loss of goods, and requires the plaintiff to give affirmative evidence of negligence.

Semble, per Allen, C.J., Weldon, Wetmore and Fraser, JJ., Palmer, J., dissenting, that it does not; but that the defendant to excuse himself must prove that the loss happened without any negligence on his part.

Where the loss of the goods was caused by the steamboat running on a bar, and afterwards sinking, the declaration of the master of the boat,

made at the time, that the grounding of the boat was an act of carelessness, is not evidence against the defendant. But, per Allen, C.J., Weldon, Wetmore and Fraser, J.J., that the evidence having been received without objection, the Judge was not bound to withdraw it from the consideration of the jury. Per Palmer, J. It was misdirection to tell the jury they might consider the declaration of the master with the other evidence.

McHUGH v. MURRAY.

Statute of Frauds—Voidable contract—Repudiation by one party—Recovery under common counts by other party for work done under the contract.

Defendant agreed verbally, to advance money to plaintiff to enable him to build a house on land of which he was to obtain a lease for a term of years; the lease to be made in the defendant's name as security for the money advanced, and to be assigned to the plaintiff on his paying the advances. The defendant advanced the money, which was expended in building the house, the plaintiff contributing towards it labour and materials, and the lease was made to the defendant as agreed. The defendant then repudiated the agreement, claiming the property as his own.

Held, that the plaintiff was entitled to recover on the common counts for his work and materials expended on the house.

DUNN v. ALLEN.

Joint promissory note—Cancelling stamps—Initials—Abbrevation of date—Note payable in bankable currency—Whether payable "otherwise than in money" within 30 Vict. cap. 34.

The stamp on a joint promissory note was cancelled by writing upon it the initials J. A. and H. W. (the full initials of one of the makers being J. E. A.), and the abbreviation "Mar." for "March."

Held, by Allen, C. J., Palmer, King and Fraser, JJ., that the stamp was sufficiently cancelled under the Act 42 Vict. cap. 17, and that the cancellation might be effected either by writing the name of the maker, or the date of the note.

Quære, whether a note for a stated sum "payable in bankable currency" is a promissory note; but if not, it came within the Act 30 Vict. cap. 34 (N. B.) as being payable "otherwise than in money." Per Palmer, King and Fraser, JJ.

Per Allen, C. J. 1. The instrument was a promissory note; the words "bankable currency" meaning, in effect, the same as "currency." 2. If it was not a promissory note, the Act 30 Vict. cap. 34, did not apply, as it was not payable "otherwise than in money," within the meaning of the Act.

Per Weldon, J. The instrument was not a promissory note, and therefore the Stamp Act did not apply to it.

THE

CANADIAN LAW TIMES.

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VENDOR AND PURCHASER—INSURANCE.

IN the preparation of contracts for sale and purchase of land too little attention is paid to the contingency of a fire happening prior to the completion of the purchase. Even in sales by auction provisions are seldom if ever inserted in the conditions of sale for the indemnity of the purchasers in case of fire. Cases have arisen in which the Courts have been tempted to make bad law for the relief of purchasers. Similar cases will no doubt arise again; and it behoves every practising solicitor to see that his client's interests are protected so that as little loss as possible may fall upon him.

So soon as there is a complete contract entered into for the purchase of property the thing sold is, in the absence of any stipulation to the contrary, at the risk of the purchaser, who must bear all subsequent losses and is entitled to all subsequent gains (*a*).

The rule is the same at law and in equity. The destruction of the property by fire is no defence to an action at law by the vendor against the purchaser for breach of contract (*b*), nor is it any defence to an action for specific performance (*c*).

(*a*) *Fry* Spec. Perfce., 401.
(*b*) *Addison* on Contracts, 175.
(*c*) *Paine* v. *Mellor*, 6 Ves. 349; *Fry* Spec. Perfce. 402.

When is the contract complete?—In private sales a completed contract may be said to be an agreement which is capable of being enforced. So soon then as the parties have agreed upon their barter, and have satisfied the fourth section of the Statute of Frauds, the contract is complete.

In judicial sales the contract made by the purchaser is not complete until the report on sale has been confirmed by the Court (*d*). A purchaser through the Court therefore assumes the risks of the property at a later period than an ordinary purchaser.

Does the policy of Insurance pass by contract?—It must be premised that there is no obligation upon a vendor to have his property insured at the time of sale. "There is not," in the words of Lord Eldon (*e*), "any warranty that the house is insured, or that it is insured to the full extent of its value. The house is bought, not the benefit of any existing policy." If then a building is being bought it is always prudent to discover if there is an existing policy. If there is not, the purchaser should insure the building, disclosing, of course, to the insurer the extent of his interest in the property (*f*).

In the event of the vendor being insured against loss, however, at the time of the sale further considerations arise.

It is settled that a contract of fire insurance is a contract of indemnity only. The loss which the person or interest insured sustains by reason of the fire, and that only, is made good. Suppose then that after the contract for sale is entered into, and before completion of the purchase, a fire takes place. Suppose, further, that the contract is silent as to that contingency and makes no provision for the application of the insurance moneys; does the policy pass by the contract? A policy of insurance is merely a

(*d*) *Stephenson* v. *Bain*, 8 P. R. 258; *Ex parte Minor*, 11 Ves. 559; *Twigg* v. *Fifield*, 13 Ves. 510; see *Anson* v. *Towgood*, 1 J. & W. 639; *Vacy* v. *Elwood*, 3 Dr. & W. 74.

(*e*) *Paine* v. *Mellor*, 6 Ves. 352.

(*f*) *Stock* v. *Inglis*, 12 Q. B. D. 564; 10 App. Cas. 263; *Milligan* v. *Equitable Ins. Co.*, 16 U. C. R. 314.

chose in action. It is not an appurtenance of the land or building. It is merely a collateral contract with reference to it. Lord Justice Cotton has described the effect of the contract in these words:—"The contract passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts" (*g*).

What then are the rights of the parties? The subject may be considered in several aspects.

I. *The rights of the vendor who has not received the purchase money to the insurance money.*—It is settled that by the mere making of the contract of sale the vendor is not deprived of his rights against the insurance company. The unexecuted bargain does not affect his right to recover. If it were otherwise he would suffer great inconvenience, and have to rely on the solvency of the purchaser. It makes no difference if the solvency of the purchaser is undoubted. The buildings remain the vendor's, notwithstanding the contract, and the insurer is bound to make good the loss (*h*).

II. *The rights of the vendor who has received purchase money to the insurance money.*—If the vendor has received the full purchase money of the property insured it is obvious that he suffers no loss and has no further insurable interest in the property. The contract of insurance is merely a contract of indemnity, and without loss there can be no liability. The vendor's rights to the insurance money therefore cease on receipt of the purchase money (*i*).

III. *The rights of the vendor who has received the insurance money to the purchase money.*—The rights of the vendor against the purchaser depend upon the contract made with him. If nothing is said about the application of the insurance money that may be received in the

(*g*) *Rayner* v. *Preston*, 18 Ch. D. 6.
(*h*) *Collingridge* v. *Royal Exchange Assce. Co.*, 3 Q. B. D. 176.
(*i*) *Powles* v. *Innes*, 11 M. & W. 10.

event of a fire, the receipt of money upon the collateral contract of insurance is no part payment of the purchase money; and the purchaser is therefore required to fulfil his contract. As we have seen, specific performance will be enforced notwithstanding the deterioration in value occasioned by the fire. The performance decreed will be in accordance with the contract and the purchaser will be required to pay his full purchase money (*j*).

IV. *The rights of the purchaser who has paid the purchase money to compel the vendor to account for the insurance money.* —*Rayner* v. *Preston* (*k*) is a clear authority upon this point. Lord Justice Cotton (*l*) dealt with the subject thus: "The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with his interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property." The present Master of the Rolls (then Brett, L. J.) aptly described the subject matter of the contract of insurance as money and money only, and showed that even if the vendor were a trustee for the purchaser of the subject matter of the insurance, as distinguished from the subject matter of the contract of insurance, it did not follow that the contract of insurance would run with the land for the benefit of the purchaser (*m*). Upon this reasoning the English Court of Appeal affirmed the judgment of Sir George Jessel (*n*) that the purchaser was not entitled to compel the vendor to account for the insurance money. Lord Justice James dissented from the views of the other Lords Justices, basing his judgment on the ground that the vendor was a trustee for the vendee

(*j*) *Poole* v. *Adams*, 10 L. T. N. S. 286; 12 W. R. 683; See *Rayner* v. *Preston*, 14 Chy. D. 297; S. C. 18 Chy. D. 1.

(*k*) 14 Chy. D. 297; S. C. 18 Chy. D. 1.

(*l*) 18 Chy. D. at p. 7.

(*m*) 18 Chy. D. at p. 9.

(*n*) 14 Chy. D. 297.

and had received the money as such in consequence of an injury done to the trust property.

It being clearly kept in mind that the policy of insurance merely indemnified a particular person from loss in respect of his interest in specific property, it follows that, even if he were afterwards to be constituted a trustee of the property for another person, he would not, without some further act, be constituted a trustee of an entirely independent and personal contract which was no part of the land.

These then appear to be the contractual rights of the vendor and purchaser. The question has, however, arisen as to whether the statute 14 Geo. III. cap. 78, sec. 83, does not confer a right on the purchaser to insist that the insurance money should be laid out in rebuilding the premises destroyed.

That statute provided that it should and might be lawful for the insurers and they were thereby authorized and *required upon the request of any person or persons interested* in or entitled unto any house or houses or other buildings which might thereafter be destroyed by fire to cause the insurance money to be laid out in rebuilding the same, unless security should be given that the money would be so laid out.

In *Rayner* v. *Preston* (*o*), the point did not properly arise as the plaintiffs, the purchasers, had not required the insurers to apply the money in rebuilding. Sir Henry Cotton, however, expressed the opinion (*p*) that the statute did not so connect the money with the land as to entitle the plaintiffs successfully to contend that under the contract they were entitled to the benefit of the statute.

The title to the Act would indicate that it extended to certain localities only (*q*); but in *ex parte Gorely* (*r*) it was held to be of universal application, and V. C. Mowat in *Stinson* v. *Pennock* (*s*) expressly held that its provisions

(*o*) Supra.
(*p*) 18 Chy. D. at p. 7.
(*q*) Property in and near London within the Bills of Mortality.
(*r*) 4 De G. J. & S. 477.
(*s*) 14 Gr. 604.

became part of the law of this Province when the body of English law was introduced by Legislative enactment (*t*). The main question would appear to be, who is a person interested in or entitled unto any house, etc. Bearing in mind the nature of a policy of insurance it would be manifestly unfair to compel the insurer to indemnify a person who was not in privity of contract with the insurer. If the party insured suffers no loss there can be no indemnity. We have seen that the vendor who has been paid by the purchaser has no right to the insurance. The insurer's duty ceases with the vendor's interest. Does the statute extend the insurer's duty? Does it in effect enact that the contract to indemnify one party shall be extended into a contract to indemnify all the world, provided the party seeking indemnity can show some interest in the property? Surely it does not go so far as that. It would appear more reasonable and more in accord with principles of legislation, especially those of the Imperial Parliament, to say that the true construction of the statute is that persons who are at the time of the issue of the policy interested in the property and for whose benefit the insurance is effected, and persons who subsequently become interested in the property, can take advantage of the statute to the extent only of the interests insured, and this only where they are to get the benefit of the insurance or the party insured holds the property insured at his risk for the benefit of others or is liable at all events to make good the interest of such other parties, so that in the event of his not applying the money in re-building they would in the event of his insolvency suffer loss.

Where there is a contract between two parties interested in an estate that one shall insure the property from loss by fire, and that the insurance money shall be applied in reinstating the buildings, each party is then interested in having the insurance money so applied, and independently of the statute it has been held that it must be so applied (*u*).

(*t*) 32 Geo. III. cap. 1.

(*u*) *Garden* v. *Ingram*, 23 L. J. Chy. 478; *Reynard* v. *Arnold*, L. R. 10 Ch. 386.

If a mortgagor covenants to insure and to assign the policy to the mortgagee, and an insurance is effected but the policy is not assigned, the mortgagee may nevertheless recover the money in case of loss, on the ground that the covenant to assign the policy operated as an equitable assignment of the money (*v*). Apart from the covenant to assign and from the statute 14 Geo. III., the mortgagee would not be entitled to the benefit of the insurance (*w*).

In *Lees* v. *Whitely* (*x*), however, machinery only was insured. The effect of the statute could not therefore be considered, as it extends only to houses and buildings (*y*). That may be the distinction between *Lees* v. *Whitely* and a case in our own Court of Chancery (*z*), where V. C. Mowat held that even where there was no covenant to insure in a mortgage, but the mortgagor did insure and the mortgagee required the money laid out in re-building, the Insurance Company was bound by the statute. In the course of his judgment the Vice-Chancellor said: "Then is a mortgagee a person interested within the meaning of the section. I do not see how I can hold that he is not. He is within the words of the enactment and his case is within the mischief against which Parliament was providing."

It is settled that outside of any conditions the policy cannot be avoided for incumbrances, unless upon the applicant's false and fraudulent answer to interrogatories(*a*), and that though an estate may be deeply encumbered the party having a right to redeem has an insurable interest to the full value of the estate (*b*). No injustice is therefore done to the insurer by the decision in *Stinson* v. *Pennock* (*c*), and the compelling of the mortgagor to keep the security

(*v*) *Greet* v. *Citizens' Ins. Co.*, 27 Gr. 121; 5 App. R. 596.
(*w*) *Lees* v. *Whitely*, L. R. 2 Eq. 142.
(*x*) Supra.
(*y*) *Ex parte Gorely*, 4 DeG. J. & S. 477.
(*z*) *Stinson* v. *Pennock*, 14 Gr. 604.
(*a*) As in *Wilby* v. *Standard Ins. Co.*, 3 Ont. R. 115.
(*b*) *Flanders* Fire Insurance, pp. 338, 393; *Klein* v. *Union Fire Ins. Co.* 3 Ont. R. 234 at p. 259.
(*c*) 14 Gr. 604.

of the mortgagee in the same state as when the fire took place is in every way just and may very well be said to come within the mischief which Parliament intended to prevent.

But a purchaser without any express stipulation as to insurance is not in an analogous position to a mortgagee. He has no remedy against the vendor for the loss occasioned by the fire. His interest is entirely separate and independent from that insured. It is a new interest; the insurers have not agreed to indemnify him and there is no privity of contract between them. Their liabilities arise only from their contract. If the purchaser has paid his money, the vendor, as we have seen, suffers no loss, and the insurers have nothing to indemnify against. If the purchaser has not paid his purchase money, his interest is manifestly less than if he had. Since he would have no rights against the insurer after payment of his money he would not *a fortiori* have any rights before such payment. The conclusion appears to be irresistible that the purchaser has no right to increase the liability of the insurers beyond their contract, by force of the statute.

Subrogation of insurer.—We have seen that notwithstanding the receipt of the insurance money the vendor can enforce payment of the purchase money. But can he keep both? Here again steps in the old principle that the policy of insurance is merely a contract of indemnity. The vendor has no right to retain more than he has lost, and if he receives the full purchase money he has lost nothing. The insurers are therefore entitled to recover back the money paid by them (*d*).

Take the case, however, of a vendor wishing to be strictly honest with a purchaser, and, even though there is no stipulation to that effect, reducing the purchaser by the amount received on the policy. Is the purchaser by this arrangement freed from the consequences of his want of care in not providing in the contract for the contingency of a fire?

(*d*) *Castellain* v. *Preston*, 11 Q. B. D. 380.

The answer to this question depends upon the position in which the insurer stands in relation to the vendor and purchaser.

The purchaser had agreed to purchase certain property, the insurer had agreed to indemnify the purchaser against loss by fire on that property. The vendor had two funds to which he could resort, (1) the purchase money, (2) the property sold. The latter was merely a security for the former. When the fire happened the insurance money was substituted for that part of the property destroyed. The insurance money, therefore, became merely a security to the vendor for part of the purchase money, and to that extent the insurer was a surety to the vendor for the purchaser.

The law of England has always favoured sureties.

The cases of suretyship are of three kinds: (i) Those in which there is an agreement to constitute for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party. (ii) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger. (iii) Those in which without any such contract of suretyship there is a primary and secondary liability of two persons for one and the same debt, the debt being as between the two that of one of those persons only and not equally of both; so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid (*e*).

In all three cases the party not primarily liable is entitled, on paying the debt, to be put in the place of the creditor (*f*).

That principle has been carried out in insurance cases, and the insurers are entitled to say to the vendor, "You lose nothing and our contract is simply a contract of indemnity. Therefore, as you have chosen to sue us and make us pay, which is your caprice, we are entitled to stand

(*e*) Per Lord Selborne, L. C., 6 App. Cas. 11.

(*f*) *Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1; R. S. O. cap. 116, ss. 2, 3, & 4.

in your place (as against the purchaser) and say, 'We claim to be put in the same position as if you had pursued your proper remedy and had made those primarily liable to you pay the amount of the loss'" (*g*).

That doctrine was affirmed by the Court of Appeal (*h*), and it is now firmly established, that on payment the insurers are entitled to be put in the place of the insured with regard to every right given to them by the law, and to enforce all the remedies, whether in contract or in tort, which the insured has against third parties whereby the insured can compel such third parties to make good the loss insured against, and if the insured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the insured the benefit thereof (*i*).

In this state of the law the importance of providing in the contract of sale for the contingency of a fire is obvious and cannot be too closely observed.

As to the best form of the provision.—No case has been found in the books in which a contest has arisen on any such provision. The books on conveyancing appear to be singularly silent on the subject. There are numerous dicta in the cases as to the advisability of providing that the insurance shall be kept up for the benefit of the purchaser (*j*). In *Powles* v. *Innes* (*k*) it was held that a person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them and before the loss, cannot sue upon the policy except as trustee for the assignee in a case where the policy is handed over to him, or there is an agreement that it is to be kept alive for his

(*g*) Per Jessel, M. R., *North B. and N. Assce. Co.* v. *Liverpool L. and G. Ins. Co.*, 5 Chy. D. 569, at p. 576.

(*h*) 5 Chy. D. 569.

(*i*) *Randall* v. *Cochran*, 1 Ves. Sen. 98; *Mason* v. *Sainbury*, 3 Doug. 61; *Yates* v. *White*, 4 Bing. N. C. 272; *North British and M. Ins. Co.* v. *Liverpool L. and G. Ins. Co.*, 5 Chy. D. 569; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Simpson* v. *Thomson*, 3 App. Cas. 299; *Burnand* v. *Rodocanachi*, 5 C. P. D. 424; 6 Q. B. D. 633; 7 App. Cas. 333; *Castellain* v. *Preston*, 1 Q. B. D. 380; *Sea Ins. Co.* v. *Hadden*, 13 Q. B. D. 706; *Sanum's* Insurance Digest, 1327-1354.

(*j*) *Poole* v. *Adams*, 10 L. T. N. S. 286; *Rayner* v. *Preston*, 18 Chy. D. 1.

(*k*) 11 M. & W. 10.

benefit. This was a case of actual assignment which of course is much stronger than a contract of sale, but it contains a judicial recognition of the principle that a policy of insurance is merely a chose in action, and since our statute (*l*) it may like other choses in action be assigned, and except there be some condition requiring the assent of the insurer, it would seem that such assent is unnecessary (*m*).

The assignment of the policy, not in pursuance of any prior stipulation in the contract, after the transfer of the property, and when the interests of the assignor had consequently ceased, will not be effectual to pass any interest in the insurance money to the assignee (*n*).

It is scarcely possible that any policy of insurance would contain a condition making the policy void on an agreement being made to sell the subject matter of the insurance. Otherwise neither vendor nor purchaser could recover.

Such an agreement is not an alienation (*o*). The statutory conditions contained in R. S. O. cap. 162, which are part of every policy of insurance affecting property in Ontario (*p*), require a consent of the insurer only to an actual assignment of the property otherwise than by succession, operation of law or death.

The reason of the insertion of this provision by insurers is explained by the late Chief Justice Spragge, when Vice-Chancellor, thus:—"Such consent is required by Insurance Companies for their own protection, and this reason is given for it, that the character of the insured for honesty and carefulness is an important consideration with insurers, and it is reasonable, therefore, that they should have a voice in the transfer of the policy" (*q*). On the consent being given, a novation of contract ensues.

(*l*) R. S. O. cap. 116, sec. 6.

(*m*) *Earl* v. *Shaw*, 1 Johns. Ch. 314.

(*n*) *North of England Pure Oil Cake Co.* v. *Archangel M. Ins. Co.*, L. R. 10 Q. B. 249.

(*o*) *Masters* v. *Madison W. Mut. Ins. Co.*, 11 Barb. 624.

(*p*) *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96.

(*q*) *Burton* v. *Gore Dist. Mut. F. Ins. Co.*, 12 Gr. at p. 161.

It would probably be sufficient in the contract of sale to provide merely that the purchaser should have the benefit of the insurance in case of loss by fire, pending the completion of the purchase. In that case, the purchaser would be entitled to the benefit of 14 Geo. III. cap. 78, upon giving notice to the insurers before payment of the money to the vendor (*r*).

In case of neglect to rebuild or secure the rebuilding, a mandamus to compel them would be the proper remedy (*s*).

The following clause is, however, suggested as indicating many of the contingencies that may arise, and as rendering more certain the rights of the parties:—"On the completion of the purchase the policy of insurance upon the buildings on said premises shall be assigned to the purchaser at his own expense. In the event of a loss by fire prior to the completion of the purchase, the purchaser shall be entitled to the benefit of the said insurance, and the amount which may be received by the vendor by reason or on account of any loss incurred or sustained by such fire shall, after deducting the costs, charges and expenses incurred in obtaining, recovering or collecting the same, be credited upon the purchase money as a payment made by the purchaser, or in the event of the said purchase money having been paid by the purchaser, the insurance money shall, upon receipt thereof, after making the deductions aforesaid, be paid over to him. Provided that the purchaser shall have the right at his own costs and charges, and after payment of such costs, charges and expenses, as may have been incurred by the vendor in respect of such insurance moneys to obtain on the completion of the purchase an assignment of the moneys to be paid under said policy in consequence of such loss. The purchaser shall pay to the vendor a proportionate part of the insurance premium on the said policy from the date hereof.

The vendor for himself, his heirs, executors, administrators, and assigns, agrees that neither he nor they will do any

(*r*) *Simpson* v. *Scottish Union F. Ins. Co.*, 9 Jur. N. S. 711; 1 H. & N. 618.

(*s*) *Ibid.*

act by which the said insurance or the right to recover under said policy, will be affected, vitiated, or in anywise impaired. The policy of insurance now existing will expire on the day of 188 , and it is agreed that either the vendor or purchaser may insure the said premises from the said date in the name of the vendor, and every such insurance shall be subject to the provisions hereof, and the purchaser shall pay the premiums thereon; but the vendor shall not be liable to the purchaser for any failure to effect such insurance, nor for any act or statement in the making thereof which may vitiate the same, unless the same shall be made or done in consequence of his wilful misconduct, neglect or default.

Remarks on proposed clause.—It will be observed that the vendor would have no right to recover against the purchaser any greater sum than the balance of purchase money due in case the vendor had received the insurance money prior to the completion of the sale. The vendor would, therefore, have no remedy to which the insurers could be subrogated (*t*).

In the event of the purchase money being paid before the insurance money, an equitable assignment of the latter would arise on the completion of the purchase (*u*).

Notice should be given to the insurers to prevent the money being paid to the vendor. Upon completion of the purchase, an actual assignment of the policy should be obtained, and the assent of the insurer would then be required under the statutory condition to make it effectual (*v*).

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(*t*) See *Simpson* v. *Thomson*, 3 App. Cas. 279.
(*u*) *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121; 5 App. R. 596.
(*v*) R. S. O. cap. 162.

THE JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE IN THE PROVINCE OF ONTARIO (*a*).

The office of Justice of the Peace and the Court of Quarter Sessions were evidently in existence in what is now the Province of Ontario before the meeting of the first Parliament of the Province of Upper Canada. This is clear from the language of several of the statutes passed at the first session of this Parliament which met at Niagara on the 17th September, 1792. By chapter 5 the magistrates of each and every district in the Province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires within the same. By chapter 6 any two or more justices of the peace, acting under and by virtue of His Majesty's commission within the respective limits of their said commissions, were empowered to hold Courts of Request within their respective divisions, which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions; and by chapter 8 the justices of the peace for the several districts in Quarter Sessions assembled were authorized to procure plans and elevations of a gaol and court house, and approve of one of them and contract for the building of such goal and court house. By statutes passed in subsequent sessions of the same Parliament the times of holding these Courts were fixed and changed, and by subsequent Parliaments the existence of these Courts was recognized; but it was not until the first session of the third Provincial Parliament which met on the 29th May, 1801, that the Statute 41 George III. chapter 6 was passed, by which—after reciting that doubts had arisen with respect to the authority

(*a*) Read by E. J. Senkler, Esq., Judge of the County Court of the County of Lincoln, at the annual meeting of County Court Judges held in 1885.

under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the Province, and also the authority under which commissions of the peace, commissions of assize and *nisi prius*, commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively—it was declared and enacted "that the authority under which the said Courts and commissions had been erected, holden and issued, and also all matters and things done by or by virtue of the same, are so far as relates to the authority under which the same have been so erected, holden, issued, and done, good and valid to all intents and purposes whatsoever, and that the provisions of all the Acts of the Legislature of the Province respecting the said Courts and commissions, or any of them, are hereby declared to extend and be in force (except as hereafter mentioned) in each and every the said districts respectively."

The enactment, so far as it relates to the authority under which commissions of the peace have been issued and the Courts of General Quarter Sessions of the Peace have been held, was embodied in the Consolidated Statutes for Upper Canada, chapter 17, section 1, and in the Revised Statutes of Ontario chapter 44, section 2, and no doubt is the authority under which the Courts of General Sessions of the Peace are now held in Ontario.

It will be observed that this enactment did not create the Courts nor even define their jurisdiction. It simply gave the sanction of the Legislature to the Courts and to the authority under which they were held, and did not indicate what that authority was.

I think, however, there can be little doubt but that the first commissions of the peace were issued in what is now Ontario in consequence of the introduction of the English criminal law, and as a part of that system.

I have not found any decision to that effect, but it seems the reasonable conclusion from the ascertained circum-

stances, and it is the view adopted by the writer in the *Canada Law Journal* of February, 1871, of an article on the jurisdiction of the Courts of General Sessions of the Peace in case of perjury; in which article the question of the origin and jurisdiction of these Courts is considered and dealt with so fully as really to leave but little to be said on the subject.

It is almost unnecessary to say that the criminal law of England was introduced by royal proclamation into the then Province of Quebec in 1763, a few months after the cession of that Province to Great Britain under the Treaty of Paris, and that on the extension of the limits of that Province so as to include all the present Province of Ontario, by the Imperial Act 14 Geo. III. chapter 83, it was by the 11th section of that Act, after praising the certainty and lenity of the criminal law of England and the benefits and advantages resulting from the use of it, which had been sensibly felt by the inhabitants from an experience of nine years, during which it had been uniformly administered, enacted that the same should continue to be administered and should be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial; and that by the Provincial Act 40 George III. chapter 1, passed in July, 1800, after reciting the Imperial Act just referred to, it was enacted that the criminal law of England, as it stood on the 17th September, 1792 (being the date of the meeting of the first Provincial Parliament), should be and was declared to be the criminal law of the Province.

I think, then, it may be fairly assumed that the Courts of General Quarter Sessions of the Peace in the Province of Upper Canada possessed whatever jurisdiction the same Courts had in England on the 17th September, 1792.

As the County of Lincoln was settled early in the history of this country, the first Parliament of the Province being held within its limits, I was in hopes of finding some old commissions of the peace which might throw light on the mode in which they were originally issued. The earliest in date that I have been able to find, however, was issued

in 1817. It appears to follow closely the form given in Archbold's Practice of the Quarter Sessions of the Peace as used in England, even retaining among the offences to be inquired into and punished by the justices appointed by it, "enchantments, sorceries, arts magic." The same words are included in the commissions of 1823 and 1828, but omitted in that of 1833, and all subsequent thereto. Of course they had no effect, all prosecutions for these offences, except for pretending to practise witchcraft, having been abolished by 9 George II. chapter 5. Their retention only affords another instance of forms surviving the object for which they were created.

The jurisdiction of the Courts of Quarter Sessions in England has been so reduced and limited by the English Statute 5 & 6 Vict. cap. 33, passed 30th June, 1842 (which has never been adopted in this country), that the English decisions since that time are of no assistance to us but are rather calculated to mislead, and but little help can be obtained from modern treatises which are of course written with a view to the existing practice in England. A very clear and succinct statement of the jurisdiction of these Courts under the commission (as distinguished from jurisdiction under subsequent statutes) will, however, be found in Archbold's Practice, already alluded to, at the commencement of the work to which I refer my readers, and of which I will merely give a brief outline and the results.

The Courts of General Quarter Sessions were established by the Act 34 Ed. III. cap. 1, by which it was enacted that in every county in England should be assigned for the keeping of the peace one lord, and with him three or four more of the most worthy in the county, with some learned in the law, and that they should have power to restrain the offenders, rioters and all other barrators; and to pursue, arrest, take and chastise them according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and custom of the realm; and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid.

In the commissions issued in pursuance of the statutes the language of the statutes is amplified a good deal, but the words all and all manner of felonies and trespasses (or trespassings, as I see in the later commissions in this Province) are always used, and the jurisdiction of the Court is governed by the construction put on these words.

What is the proper construction was in former times a matter much disputed, and during these times it was settled that neither perjury at common law nor forgery at common law is within the jurisdiction of the Court; and this was recognized and affirmed by Lord Kenyon in the case of *Rex* v. *Higgins*, 2 East 5; and although he admitted he did not know the reason for the decisions, he considered them so well established that he would not interfere with them. Subject to those two exceptions, Mr. Archbold says that in modern times the general opinion of the profession is that the Court of Quarter Sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanors, whether created before or after the date of the commission. As to the word trespasses, he says the word used when the commissions were in Latin was "transgressiones," which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass lies. It was usually rendered into law French by the word "trespas," and that is the word used in the original French of the Statute 34 Edward III. cap. 1, and it is there rendered into English by the word "trespasses." It is said that when a statute creates a new offence, and directs it to be prosecuted before a court of Oyer and Terminer or general gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the Sessions with respect to that particular offence: *Rex* v. *Rispail*, 1 Wm. Bl. 368; 3 Burr. 1320.

Where, however, a statute required that the offenders against it should be carried before a justice of the peace, and by him committed to the county gaol there to remain

until the next Court of Oyer and Terminer, great session or gaol delivery, the Court held that as the offence was a misdemeanour only, and the defendant might be prosecuted for it without being apprehended or in custody, the clause in the Act did not prevent the indictment being preferred at the Sessions; *Rex* v. *Cook*, 4 M. & S. 71.

It would seem from this latter case that the Sessions would only be barred jurisdiction where there was an express direction that the offence should be prosecuted before the Court of Oyer and Terminer or general gaol delivery.

Although Lord Kenyon, as I have already mentioned, in recognizing the fact that perjury and forgery at common law were exceptions to the class of offences which, being violations of the law of the land, have a tendency as it is said to the breach of the peace and are therefore cognizable by the Sessions, uses the expression, "why exceptions I know not," it seems clear that the reason why it was held that the Sessions had not jurisdiction over them was that it was considered these offences had not a direct and immediate tendency to cause such breaches of the peace as some other offences, which for that reason had been held to be indictable at the Sessions. In 2 Hawkins' Pleas of the Crown, book 2, cap. 8, sec. 64, it is said: "Yet it hath of late been settled that justices of the peace have no jurisdiction over forgery and perjury at the common law, the principal reason of which resolution, as I apprehend, was that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass' in its most proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to create such breaches of the peace as libels and such like, which on this account have been judged indictable before justices of the peace."

This passage is quoted by Mr. Justice Wightman in his judgment in *ex parte Henry Bartlett*, reported in 7 Jurist

649, decided in 1843, when the question of the power of a justice to commit for trial on a charge of forgery was discussed at considerable length.

This reasoning seems to be adopted and approved of by Chief Justice Wilson in the case of *Regina* v. *McDonald*, 31 U. C. R. 339, when he says perjury and forgery not being attended with a breach of the peace, the Courts of Quarter Sessions cannot try them.

Assuming then that the Court of Quarter Sessions in Upper Canada had the same jurisdiction as these Courts in England, and consequently jurisdiction over all cases of felony and misdemeanour except perjury and forgery, and such new offences as by the Act creating them were directed to be tried at the Courts of Oyer and Terminer and general gaol delivery; it remains to consider the changes effected by Canadian legislation and the decisions of our own Courts.

The Statute 7 William IV. chapter 4 abolished the distinction between grand and petit larceny, and enabled the Sessions to try all cases of simple larceny (under certain restrictions when they were not presided over by a barrister). This statute seems to follow substantially the English Act 7 & 8 George IV. chapter 29, sections 2 & 3, although in the English Act the Court of Quarter Sessions is not mentioned, but every Court whose power as to the trial of larceny before was limited to petit larceny was given the power to try every case of larceny, the punishment of which could not exceed the punishment therein mentioned for simple larceny.

It is said in Dickenson's Guide to the Quarter Sessions that in England prior to this Act the Courts of Quarter Sessions only professed to try petit larcenies.

The various enactments in force as to the Sessions were consolidated in chapter 17 of the Consolidated Statutes for Upper Canada, and most of those are now in chapter 44 of Revised Statutes of Ontario.

No definition or limitation of the jurisdiction of the Court is to be found in either of these statutes, although in the Consolidated Statutes, chapter 17, section 3, is to be found

the 5th sec. of 7 William IV. cap. 4 declaring that it shall not be necessary for any Court of Quarter Sessions to deliver the gaol of all prisoners who may be confined upon charges of simple larceny, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer if by reason of the difficulty or importance of the case, or for any other cause it appears to them proper to do so.

In the Dominion Statutes passed in 1869, 32 & 33 Vict. there are several important enactments affecting the jurisdiction of the Sessions.

They are 32 & 33 Vict. cap. 29, sec. 12, by which it is enacted that no Court of General or Quarter Sessions or Recorder's Court, nor any Court but a Superior Court having criminal jurisdiction, shall have power to try any treason or any felony punishable with death or any libel.

This is, except as to the prohibition against libel, a re-enactment of 24 Vict. cap. 14 in substance.

Mr. Taschereau in his book on the Criminal Acts has given a list of the offences in respect of which the Sessions have not jurisdiction, in which he has included administering poison or wounding with intent to murder, and carnally knowing a girl under ten years of age. In both cases the death penalty has been abolished since the publication of his book, and I presume the offences are now within the jurisdiction of the Court.

Then 32 & 33 Vict. cap. 20 sec. 48 by which it is enacted that neither the justice of the peace, acting in and for any district, county, division, city or place, nor any judge of the sessions of the peace, nor the recorder of any city shall at any session of the peace try any person for any offence under the 27th, 28th and 29th sections of that Act, that is for causing injuries by the explosion of gunpowder or other explosive substance or any corrosive fluid to persons or buildings, ships or vessels, and 32 & 33 Vict. cap. 21. sec. 92 by which it is enacted that no misdemeanour against any of the sixteen last preceding sections of that Act shall be prosecuted or had at any Court of General Quarter Sessions of the Peace; these sixteen sections all relate to frauds by agents, bankers or factors.

Chief Justice Wilson in the case of *Regina* v. *McDonald*, 31 U. C. R. at page 339, refers to the three statutes which I have just mentioned, and says: "The exceptions contained in the last three named statutes, and the excepted cases of forgery and perjury, define as nearly as may be what the general jurisdiction of the Sessions of the Peace is: the unexcepted offences they may try."

This judgment was pronounced in 1871. Since then the Dominion Act, 37 Vict. cap. 9, was passed (in 1874), by section 118 of which it is enacted that no indictment for bribery or undue influence, personation or other corrupt practices shall be triable before any Court of Quarter or General Sessions of the Peace.

This Act refers to elections of members of the House of Commons, but it is suggested by Mr. Justice Taschereau, that perhaps the words of the section I have quoted are wide enough to extend to elections of the Local Legislature and to municipal elections.

I do not know of any other provisions limiting the jurisdiction of the Sessions. It is quite possible that some have escaped my observation as the little time at my disposal has not allowed me to make as close and thorough an examination of the statutes as I could have wished. I did not, however, expect to make this paper exhaustive of the subject. In any case which may come up for trial of an unusual character or under any special statute the provisions of the Act creating or defining the offence will always have to be carefully examined to ascertain what provisions if any, have been made as to the mode of trial.

In addition to the offences I have named, Mr. Taschereau suggests that counterfeiting coin is declared to be treason by different statutes, and consequently is not triable at the Sessions. No doubt counterfeiting the king's money in former times was treason, but under the Canadian Statutes it is expressly declared to be felony, the form of indictment given in the Criminal Procedure Act uses the word feloniously, and so do the forms I find in the books on criminal pleading. I doubt the offence now being punishable as treason.

Mr. Taschereau also suggests that subornation of perjury is by common law not within the jurisdiction of the Sessions, and refers to Dickenson's Quarter Sessions in support of his view. This authority sustains him, but the cases referred to in Dickenson do not seem directly in point. The reason, however, for excluding perjury seems equally forcible for excluding subornation of perjury.

I have more than once referred to the case of *Regina* v. *Macdonald*, 31 U. C. R. 337, in which it was laid down that the sessions had no jurisdiction in cases of either forgery or perjury. This case follows, on the question of forgery, the decision of Chief Justice Robinson in *Regina* v. *Dunlop*, 15 U. C. R. 118, and is supported on the question of perjury by the subsequent decision of *Regina* v. *Currie*, 31 U. C. R. 582.

In none of these cases is the distinction between forgery and perjury at common law and the same offences by statute adverted to, nor does it appear what was the nature of the offence in these cases in this particular. In the English authorities I have referred to, the jurisdiction of the Sessions is denied in cases at common law, and it is admitted that the sessions had jurisdiction in cases of perjury at all events under the Statute 5 Eliz. cap. 9, (which relates to perjury by witnesses in Court), by virtue of the words of that statute. In the article in the *Canada Law Journal* of February, 1871, to which I have already adverted, the view is sustained that the Sessions still have jurisdiction in cases of perjury by witnesses in Court, and a distinction is taken between the language of our statute 32 & 33 Vict. cap. 28, sec. 6, and the English Act, 14 & 15 Vict. cap. 100, sec. 19, from which our Act is taken, as indicating that in this country the jurisdiction over such cases is not confined to the assizes only as in England. The writer of that article, however, suggests that in view of the directions given by the statute of Edward to the Sessions in cases of difficulty not to give judgment unless in the presence of a justice of one or the other Bench, or the justice assigned to hold the assizes, it is not probable that the justices in Sessions will take upon themselves to decide

such cases, but will leave them over to be tried by the judge holding the assizes.

Since the decisions I have cited from 31 U. C. R., I think it still more likely that the course he suggests will be adopted.

I had intended saying something on the jurisdiction of the Sessions in matters of appeal from magistrates' convictions, but this paper has been drawn out longer than I expected, and I find that all I could say on that subject can readily be found from the authorities in Robinson & Joseph's Digest.

I will conclude by saying that whatever may be the difficulties in reconciling the opinions expressed at different times on the subject, a safe guide to the present jurisdiction of the Sessions may be found in the words I have quoted from the judgment of Chief Justice Wilson in *Regina* v. *Macdonald*, 31 U. C. R. 351, supplemented, of course, by whatever limitations may have been made by subsequent statutes.

EDITORIAL REVIEW.

Unearned fees of Counsel.

The example set by the present Attorney-General of England respecting unearned fees, and made public by a recent case submitted to him, will, we hope, be universally followed by the Bar, as it shows a more healthy feeling than was displayed by the old fashion of keeping all unearned fees.

The case was as follows:—A Queen's Counsel had been briefed and a consultation was held with him, but he was unable to attend the trial. Under these circumstances the solicitor who instructed him, at the suggestion of his client, asked for a return of the fee. The reply was that if a precedent could be found, he would be happy to accede to the request. It was then referred to the Attorney-General, who stated that his usage had always been to "return so much of the brief fee as exceeds the amount which would have been proper if the brief had been simply a case for opinion." This opinion was promptly acted on. The *Law Journal* remarks, "such a proceeding would have made old-fashioned practitioners 'stare and gasp,' but its fairness is obvious. The advocate is paid for the attention which he has bestowed on the case, and the client does not pay for an advocacy which he did not enjoy. Public opinion in the profession is, we think, ripe for the change, and although the Attorney-General does not lay it down that counsel are bound to follow this course, his example is practically binding on the rest of the profession."

The practice of keeping unearned fees had nothing but fashion to justify it, and nowhere could it have enjoyed so long a life as amongst a people whose conservatism is proverbial.

Riel's Case.

It is a matter of gratification that we can say of Riel, the leader of the rebellion in the North-West Territories, that after his capture he was put on trial in the heart of the Territories, before local Magistrates and a jury selected from those who dwelt in the neighbourhood, and that his fellow subjects after hearing the best defence that could be made for him found him guilty of the offence with which he was charged. The law has been administered in regular course without a special commission, and with no more pomp and circumstance than the usual business of the Magistrates' Court called for. Those who are more familiar with the forms of administering justice, cannot but respect the verdict. But it is questionable if those who most require an example to be made, viz. the Indians and Half-breeds, would not have derived more instruction from the execution of the orders which were originally given to the commander of the expeditionary force. The orders, as reported to have been read in the House of Commons, were, "Suppress the rebellion and hang the ringleaders." Riel might have been tried by Court-martial. Caught red-handed, as he was, his trial on the spot by Court-martial, his conviction (a matter of certainty), and the speedy execution of the sentence in the face of the Half-breeds and Indians, would have administered a lesson which they would not readily forget.

The Indians at least, do not comprehend and appreciate the blessings of trial by jury. One is reported to have said, after being sentenced, that the white man had had a big talk all to himself. The conviction and sentence, have been so long deferred that the example loses a great deal of its force. Cause and effect are too remote from each other.

With respect to Riel's sanity, the subject is publicly discussed as if the matter had not not been settled by the proper tribunal. The defence of insanity was most distinctly raised, and was in fact the only defence relied upon, after the question of jurisdiction had been ruled upon. And the

verdict was a distinct finding that he was accountable for what he had done. The recommendation to mercy cannot be distorted into a verdict of insanity. It has been stated that one of the alienists, who was examined for the defence, said that if he had to give evidence again, he would pronounce more certainly in favour of insanity than he did at the trial. We can hardly believe that a man occupying a high and responsible position could have so expressed himself; but if it is a fact that he did so his evidence has, in our opinion, lost what weight there was in it.

Proposed New Rules.

We have received a copy of some draft rules proposed for the consideration of the Judges. A great number have been prepared by the Registrar of the Chancery division, and a few by the Inspector of legal offices. The interest exhibited by "practitioners" in reforming the practice is displayed in seven draft rules which appear in the pamphlet, two of which are condensed by the Inspector of legal offices into one rule. We shall refer to some of the rules in detail in a further number.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

SYNOD OF HURON v. WRIGHT.

Member of Synod—Trust, construction of—Vested rights—Commutation fund.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society, upon trust to pay to the commuting Clergy their stipends for life, and when such payment should cease then "for "the support and maintenance of the clergy of the Diocese of Huron in "such manner as should from time to time be declared by any by-law or "by-laws of the Synod to be from time to time passed for that purpose." In 1869 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each $700, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund and made a different appropriation of it.

Held, affirming the judgment of the Court below, Fournier and Henry, JJ., dissenting, that under the terms of the trusts, the trustees were free at all times to repeal previous by-laws respecting the fund in question and make a different appropriation of it, and that the plaintiff had no contract or vested right which could entitle him to object.

McCarthy, Q.C., and *Harding*, for the appellant.

S. H. Blake, Q.C., for the respondents.

MANITOBA.]

McKENZIE v. CHAMPION.

Agent—Sale by—Duty of agent—Commission—Mis-trial.

The plaintiffs, real estate brokers at Winnipeg, were instructed generally by the defendants to sell certain lands of theirs at certain prices and terms of payment. The plaintiffs did make a sale of these lands and signed a receipt for $5,000, paid cash on account of purchase money which was paid to defendants. The purchasers subsequently refused to carry out the purchase, and from the absence of writing signed by them they could not be compelled to do so. The plaintiffs then brought their action for commission upon the entire purchase money as if the contract had been carried out by the purchasers. The case came on for trial before a jury who followed the charge of the Chief Justice and found a verdict in favour of the plaintiffs for the full amount of their claim, viz.: two and one-half per cent. commission upon the entire purchase money of the lands. The jury were not asked to pronounce upon the nature of the terms upon which the plaintiffs were employed. In review before the full Court a new trial was granted, (if the plaintiffs were not willing to reduce the verdict for their commission to two and one-half per cent. on the $5,000 paid), on the ground that it was the duty of the plaintiffs to bind the purchasers as well as the defendants.

Held, Strong, J., dissenting, affirming the judgment of the Court below, that there had been a mis-trial.

MacMahon, Q.C., for the appellants.

McCarthy, Q.C., for the respondents.

P. E. ISLAND.]

REGINA v. THE BANK OF NOVA SCOTIA.

Insolvent Bank—Winding up proceedings—Priority of Crown as simple contract creditor—Acceptance of dividends by Crown not waiver.

The Bank of Prince Edward Island became insolvent and a winding up order was made on the 19th of June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the Government to the credit of the Receiver General. The first claim filed by the Minister of Finance at the request of the respondents, (liquidators of the Bank,) did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th of February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon Her prerogative right to be paid in full. At this time the

liquidators had in their hands a sum sufficient to pay in full Her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz.: That Her Majesty, the Queen, represented by the Minister of Finance and the Receiver General has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

Held, reversing the judgment of the Court below, (i) That the right of the Crown claiming as a simple contract creditor to priority over other creditors of equal degree cannot be disputed.

(ii) That this prerogative privilege belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of a provincial corporation in a provincial Court.

(iii) That the Crown can enforce this prerogative right in proceedings in insolvency under 45 Vict. cap. 23.

(iv) That the Crown by its acceptance of two dividends had not waived its right to be preferred to other simple contract creditors.

Burbidge, Q.C., for the appellant.

Hodgson, Q.C. and *Fitzgerald, Q.C.*, for the respondents.

INGS v. THE BANK OF PRINCE EDWARD ISLAND.

Insolvent Bank—Winding up proceedings—Set off by contributory in an action on a promissory note by liquidators of a bank—45 Vict. cap. 23, sec. 76, construction of.

In May 1882, the Bank of Prince Edward Island discounted the appellant's note for $6,000, and on the 5th of May, 1882, the appellant purchased in good faith and for value, a draft of the P. E. I. Bank, for $5,685.00. The Winding-up Act was passed on 17th May, 1882, and on the 19th June, 1882, a winding up order was made on the P. E. I. Bank. The appellant was a shareholder, and was settled on the contributory list. The appellant's note fell due on the 3rd June, 1882, and he set up the above draft of which he was then the holder and indorsee, as a set off, and paid the difference in cash. The bank refused to allow this set off, and subsequently brought suit in the Supreme Court of P. E. I. on the note, to which the appellant pleaded the cash payment and the above draft as set off. A verdict was found for the respondents, the learned judge having charged the jury that sec. 76, of 45 Vict. cap. 23, was retrospective.

On a motion for a rule *nisi* for a new trial, the rule was discharged by the Supreme Court of Prince Edward Island.

Held, reversing the judgment of the Court below, that section 76 of 45 Vict. cap. 23 did not apply, because the draft was bought before the Act was passed, and because by its terms it is confined to cases of set off by contributories against claims for contribution, and that the appellant having purchased bona fide and for value the draft in question he was entitled to set it off against the note sued on.

L. Davies, Q.C., for the appellant.

R. R. Fitzgerald, Q. C., and *F. Peters*, for the respondents.

FITZGERALD v. McKINLAY.

Canada Temperance Act 1878—*sec.* 107—*Appropriation of fines*—31 *Vict. cap.* 1—*Applicable to Province of Prince Edward Island*—*Sec.* 7, *sub. sec.* 22—*Construction of.*

McK. (the respondent) prosecuted one B. before F. (the appellant) as stipendiary magistrate for a breach of the 100th section of the Canada Temperance Act 1878. B. was convicted and fined $100, and the fine was paid to F. as stipendiary magistrate.

McK. thereupon applied to the Supreme Court of Prince Edward Island, and obtained a rule *nisi* for a mandamus to compel F. to pay over to him one half of the said sum of $100, and the rule after argument was made absolute.

Held, reversing the judgment of the Court below, that whereas a mode of recovering penalties imposed by the Canada Temperance Act, is given by section 107, viz: under the Summary Convictions Act, 32 and 33 Vict. cap. 21; and that Act makes no appropriation of the penalties, the same belong to the Crown.

Held, also that the Interpretation Act, 31 Vict. cap. 1 (D), is in force in Prince Edward Island, but that the sub. sec. 22 of sec. 7, only applies to fines imposed for the infraction of an act which in itself appoints no specific mode for their recovery.

L. Davies, Q.C., for the appellant.

F. Peters, for the respondent.

NEW BRUNSWICK.]

Ex parte J. D. LEWIN.

St. John assessment act of 1862—Assessment of capital and stock of bank—Whether real and personal property belonging to, may be assessed.

By "The St. John Assessment Act of 1882," section 25, all rates and taxes in the city are to be raised by an equal rate upon the real estate therein, and on the personal estate and income of the inhabitants, and of persons declared to be inhabitants for the purpose of taxation, and upon the capital stock, income or other thing of Joint Stock Companies or corporations, and shall be levied as follows, viz: by a poll tax of one dollar on all the male inhabitants of twenty-one years of age, and the residue upon the rateable property, real and personal and rateable income and joint stock, according to its true and real value, provided that joint stock shall not be rated above the par value thereof." By section 28, Joint Stock Companies and Corporations are to be assessed in like manner as individuals, and the president or manager of such joint stock company, &c., is to be deemed to be the owner of the real and personal estate, capital stock and assets of such company, and shall be dealt with accordingly. By the Acts incorporating the Bank of New Brunswick, its capital or stock was fixed at one million dollars In 1882, the appellant, president of the Bank, was assessed under the 28th section of the Assessment Act, on real estate valued at $42,200, and personal estate of $1,057,800, making together $1,100,000. The value of the capital stock of the bank was par.

Held, reversing the judgment of the Court below, that all the property, real and personal, of the New Brunswick Bank formed its assets, and should be assessed as capital stock, and only at the par value thereof.

Weldon, Q.C., for the appellants.

Dr. Tuck, Q.C., and *Millidge*, for the respondents.

ONTARIO.

In the Maritime Court.

(Reported by R. Gregory Cox, Esquire, Barrister-at-Law.)

THE C. N. PRATT.

Re-arrest in second suit for same cause of action—Effect of arrest and bail in a foreign court—Effect of foreign judgment—Lien of master for wages as against mortgagee—Rights of master part-owner—Master's right to ten days' double pay—Estoppel—Right to raise at the hearing defences not set up in the answer.

The steam barge *C. N. Pratt* was a Canadian vessel registered at Windsor. On 25th May, 1883, the plaintiffs filed a petition in this Court at Sandwich, and caused the vessel to be arrested, in a cause of wages and disbursements. Bail was given, and the vessel released. She was subsequently arrested under a warrant issued from the United States District Court at Detroit, at the suit of another party, and this plaintiff thereupon filed a libel in that suit on the 19th June, 1883, no further step in the meantime having been taken in the suit at Sandwich. On 20th June, 1883, notice of discontinuance of the latter suit was filed.

Bail was given and the vessel released in the American Court, and answers were filed by the present defendants, setting up the proceedings at Sandwich as a defence. By consent of all parties the suit in the American Court was dismissed, without being brought to a hearing. Subsequently the plaintiff took out an *ex parte* order dismissing his suit at Sandwich, and then filed a new petition for the same cause of action, in this Court at St. Catharines. The vessel was arrested for the third time.

Held, that the prior proceedings at Sandwich and Detroit were not a bar to this action; that the plaintiff's lien was merely suspended by bail being given in those suits, and that the same being dismissed without any judgment on the merits, the lien could be enforced in another suit.

Held, also, that the judgment of a foreign court, unless pronounced on the merits is no estoppel.

The *C. N. Pratt* was built in 1881 for P. The plaintiff contributed certain machinery to the boat upon the understanding that he should have a certain interest in her when completed. The defendants W. & C. advanced moneys to P. to assist in building the boat, and took from him three agreements to the effect that when completed the vessel was to be registered in W.'s name who was to transfer 22 shares to his co-defendant C. When the last agreement was signed, the defendants exacted from the plaintiff a declaration in writing that he had no interest in the machinery or in the vessel. P. was to manage the vessel and pay off the advances out of her earnings. The vessel was finished and registered in W.'s name, who transferred 22 shares to C.P. managed the general business of the steam barge and her consorts until November, 1882. On 1st February, 1882, he employed the plaintiff as master to take charge of the vessel and her consorts. The plaintiff accounted to P. for the earnings of the vessel until November, 1882, when W., being dissatisfied with P.'s management, and default being made in repayment of advances, ordered the plaintiff to send the vessel's earnings to him thereafter. The plaintiff did pay over some of the earnings to W., but P. still kept the books as before. The plaintiff was dismissed by W. in April, 1883.

Held, that the defendants were mortgagees of the vessel and not owners, though registered as such; that they were not mortgagees in possession

at all events prior to November, 1882; that they were estopped by their conduct in taking the declaration from the plaintiff that he had no interest in the vessel, from now alleging that he had an interest, and was in fact a part owner, and as such not entitled to a lien for his wages against them; that the plaintiff was entitled to a lien for his wages during the whole period of his employment, even as against the defendants.

Held, also, that the plaintiff was not entitled to ten days' double pay for delay in payment.

Semble, that the lien of a master, who is also part owner, is postponed to a claim under a mortgage on the vessel made with his consent.

Held, also, that defendants may be allowed to raise at the hearing defences not set up in their answers filed.

The petition in this cause was filed in this Court at St. Catharines on 14th February, 1884, on behalf of Peter Williams against the steam barge *C. N. Pratt*, claiming the sum of $1,008, wages as master of the vessel from 1st February, 1882, to 4th May, 1883, at the rate of $800 a year, together with interest and ten days' double pay. The petition also contained a claim for an alleged balance of disbursements on account of the vessel, which, however, was abandoned at the hearing, and need not be further alluded to. The vessel was duly arrested, and held under arrest until the close of this litigation.

Answers were filed on behalf of Simon Wigle and William R. Callaway, defendants intervening, setting up that they were only mortgagees of the boat and that one C. N. Pratt was the vessel owner, and engaged the plaintiff, who was aware of the true position of the defendants as mortgagees, and relied on the personal credit of Pratt, and not on the credit of the vessel.

They also set up prior proceedings in this Court at Sandwich and in the United States District Court at Detroit, as a bar to the action.

The cause was heard before E. J. Senkler, Esq., Surrogate Judge at St. Catharines.

The facts proved at the hearing were, that the steam barge *C. N. Pratt* was built in 1881 for Mr. C. N. Pratt. Pratt got some assistance from Callaway, and on 19th May, 1881, entered into a written agreement with Callaway reciting that Callaway had advanced him $1,500, and had agreed to advance $3,500 more; and Pratt agreed to repay these sums out of the first earnings of the boat, and to give Callaway a first lien on the boat for the advances, and when the boat should be completed to transfer 22 shares in her to Callaway, to be held by him until the said advances should be repaid.

On 11th August, 1881, an agreement (under seal) was entered into between Pratt and Wigle, reciting that the steam barge was being built for Pratt, and that he required $6,000 to finish her, and that Wigle had agreed to endorse two promissory notes at four months for $3,000 each, for Pratt, and the latter had agreed to assign the boat to Wigle as security, and Pratt covenanted that upon the completion and registration of the vessel, he would transfer 32 shares in her to Wigle.

On 29th December, 1881, a second agreement, also under seal, was entered into between Pratt and Wigle, reciting the former agreement of 11th August, 1881, and that the notes referred to in it had not been paid, and that Pratt required more money to finish the barge, and that it had

been agreed that Wigle should endorse two more notes for $2,000 each at four months. Pratt agreed to give Wigle a chattel mortgage on the boiler engine and wheel of the steam tug *Mystic*, the boiler of the steam tug *Zouave*, and the engine and the wheel of the steamer *Lake Breeze*, and to assign to Wigle certain timber limits, and also agreed that the barge should be registered in Wigle's name, who agreed to transfer 22 shares to Callaway, and after payment of the notes, to transfer the remaining 42 shares to Pratt or his appointee. Provisions were also made for the event of default in payment. The plaintiff was not a party to any of these agreements, but was cognizant of them. It further appeared that the boiler and engine of the tug *Mystic*, valued at $5,000, and some machinery belonging to the *Lake Breeze*, valued at $800, were put into the steam barge *C. N. Pratt* when she was building. The plaintiff owned a one-third interest in this property. Pratt testified that it was understood that it was to be put in the boat, and the plaintiff gave a different version of the matter, stating that he sold his interest in this property absolutely to Pratt, but had the privilege of taking a share in the *C. N. Pratt* if he chose.

On the 29th December, 1881, before the agreement under seal of that date above set forth was made, the plaintiff signed a declaration, at the request of the defendants, stating that he had no claim on, or interest in, the property referred to, or in the steam barge *C .N. Pratt*. This agreement, as well as the others, was produced and put in evidence by the defendants.

On the date of the last agreement (29th December, 1881) the *C. N. Pratt* was registered in Wigle's name as owner, and he thereupon transferred 22 shares to Callaway.

On 1st February, 1882, the following agreement as entered into between Pratt and the plaintiff:

"February 1st., 1882."

"Capt. P. Williams, Windsor, Ont.:

Dear Sir,—I will give you eight hundred dollars ($800) a year for your services as captain of the steam barge *C. N. Pratt*, with the understanding that you take complete charge of all boats in our employ. Time to commence this date and continue until further notice; and I am to give you one month's notice of any change to be made, you to do the same if you desire a change. And it is mutually agreed and also understood that in any case time worked for is to be paid in proportion of above named salary. If this is acceptable please acknowledge on bottom of this.

Yours truly,

C. N. PRATT."

"I accept the offer as above written,

Yours truly,

P. WILLIAMS."

"All boats in our employ" referred to were the steam barge's consorts. Part of the season she had two, sometimes three; towards the close of the season she had none, towing being then impossible. The plaintiff entered upon his employment and continued in it until dismissed by

Wigle, as he alleged, on 9th April, 1882. Wigle denied that he dismissed him but admitted that he engaged another captain on that date. The plaintiff took charge of the steam barge, as captain, during the whole season of 1882. Pratt managed the business of the barge and her consorts, and the plaintiff accounted to him, and transacted the financial business of the barge with him until at all events about 1st of November, 1882, when Wigle came on board and directed the plaintiff for the future to send the boat's earnings to him. Wigle was at this time dissatisfied with Pratt's management of the boat, as he was not earning enough to pay the advances. Pratt continued, however, after this to keep the books as before.

Prior to the filing of the Petition in this cause, and on the 25th May, 1883, plaintiff had filed a similar petition for precisely the same claim, in this court at Sandwich. On that day a warrant was issued under which the steam barge was arrested on the following day. The same day a bond was duly filed by Wigle and the vessel released. No answer was filed, and on 20th June, 1883, a notice of discontinuance of the action was filed and on 14th February, 1884, an *ex parte* order was taken out dismissing the action.

On the 19th June, 1883, the plaintiff also took proceedings in the District Court of the United States for the Eastern District of Michigan in Admiralty against the steam barge (which had been arrested on the preceding day on a warrant issued from said District Court in another suit brought by another party in that court) by filing a libel against her for the same claim and prayed to be allowed to intervene against her.

On the same day Wigle filed a claim to the vessel, and entered into a bond, upon which she was released. On 24th September, 1883, Wigle and Callaway filed their answer in the District Court, in which among other things they set up the proceedings at Sandwich as a bar to the plaintiff's claim.

The plaintiff was advised that he could not succeed in the American Court on account of the proceedings he had taken in this court at Sandwich, and accordingly by consent of all parties the suit was dropped, and the following order made on the 15th of February, 1884:—

"It appearing to the Court that this cause has been settled, it is now ordered that the said libel be and the same is hereby dismissed without costs to either party." There was in fact no settlement of the plaintiff's claim.

Solomon White and *Pattison* for the defendants.

The proceedings at Sandwich and Detroit are a bar to the plaintiff's claim. Once bail is given the maritime lien is divested and the vessel cannot be re-arrested for the same cause of action; *The Bark Thales* (*a*); *The Thales* (*b*); *The Kalamazoo* (*c*); *The Flora* (*d*); Ontario Judicature Act, Rule 330; Williams & Bruce Ad. 211.

(*a*) 3 Benedict's D. C. R. 327.
(*b*) 10 Blatch. 203.
(*c*) 15 Jur. 885.
(*d*) L. R. 1 A. & E. 45.

Whatever claim the plaintiff may have had, was, by these proceedings, converted into a claim against the bail, and it is not competent for him to re-arrest the vessel or proceed against her again. This consequence follows no matter in what way the suit is terminated, whether it is abandoned or carried on to final judgment.

As to the merits, the defendants were really mortgagees of the vessel and not owners although registered as such. The agreements with Pratt shew their true position, that they held the vessel merely as security for their advances. The plaintiff had a share in the barge, and was in effect a mortgagee. Although not a party to the agreements, nor personally liable for the advances, his property was mortgaged and he had a right to redeem. Being a part owner his lien for wages is postponed to the claim of the mortgagees, certainly so much of it as accrued prior to Wigle's taking possession in November, 1882. As to the period after that date, the accounts show the plaintiff in debt to the vessel and nothing due him.

R. Gregory Cox, contra.

The English authorities show that it is only when a cause is carried on to trial and judgment pronounced on the merits, that the lien is divested. Arrest followed by bail and release, merely suspends the operation of the lien. If the suit is discontinued or abandoned before judgment on the merits, the result is analogous to that of a non-suit at law and the plaintiff can sue again. The operation of the lien is no longer suspended and it can be enforced in another suit. In the *Kalamazoo*, relied on by the defendants, an attempt was made to re-arrest in the same suit after judgment. The subsequent case of *La Flecha* (*e*), decided by the same judge, shows the construction to be placed on the language of the judgment in the earlier case. The true rule is laid down in *Coote's* Ad. Pr. 2nd Ed. 19. See also *Boyd's* Adm. Pr. 39, to the like effect, and *The Bold Buccleugh* (*f*).

The American authorites are conflicting; *United States* v. *Ames* (*g*). In *The White Squall*, the arrest was after judgment and sale to a *bonâ fide* purchaser. A foreign judgment, unless on the merits, is not an estoppel (*h*). As to the merits. The one conclusion to be drawn from the agreements produced by the defendants is that the barge was from the beginning run for the benefit and in the interest of the defendants, and they were mortgagees in possession from the first, if not actually owners. The first agreement expressly provides that the advances were to be repaid out of the vessel's earnings. In any event, the plaintiff's lien must prevail over their claim. It is not open to the defendants, after exacting from the plaintiffs the declaration of the 29th December, 1881, disclaiming any interest in the vessel, to allege now that he was in fact part-owner. The only interest the plaintiff ever had in the vessel was an option to take a share, which he never exercised. Pratt was the one owner, and was so treated by the defendants. The answers do not set up

(*e*) 1 Spinks 439.
(*f*) 10 Jur. 134.
(*g*) 99 U. S. R. 41, 42.
(*h*) *The Delta*, L. R. 1 P. D. 393.

any defence, on account of, or arising from, any interest held by the plaintiff, and it is not open to the defendants to raise this defence now; *The Mary Ann* (*i*); *The Fevonia* (*j*); *The Charles Amalia*(*k*); *Boyd's* Merch. Sh. Acts, pp. 173 and 456.

SENKLER, Sur. J., 12th May, 1884.—The first objection taken by the counsel for the defendants is that the petitioners having caused the arrest of the steam barge on the former proceeding taken by him, and the steam barge having been released upon bail, whatever claim the petitioners had against her was converted into a claim against the bail, and it was not competent for him to arrest her or proceed against her again; and he contends that this consequence follows an arrest and a giving of bail, no matter in what way the suit is terminated, whether the suit is abandoned or whether it is decided by a judgment of the Court.

It will be convenient to consider this question first, before entering upon the case on the merits.

This ground of defence arises in respect of both the arrest and giving bail at Sandwich, and the arrest and giving bail at Detroit. The first arrest and giving bail is indeed set up as one of the grounds of defence to the action at Detroit in the answer of the defendant filed in that action.

The first case cited by Mr. White, the bark *Thales*, seems to be a direct authority for the position taken according to the law of the United States. In that case one of the defences set up was that a prior suit had been instituted by the plaintiff in the same cause of action, and that the vessel had been arrested and discharged on a bond being duly given in that suit, and that thereby the vessel was discharged from the claim. This was held to constitute a good defence, and the fact that the original suit was discontinued with the consent of the claimants therein, and that they received and accepted the costs of the suit, did not alter the case; nor did the fact that the vessel was bonded and discharged in the former suit without notice to the libellants.

The Judge who decided the case, referred to the case of the *Kalamazoo*, and also to *Coote's* Adm. Pr. p. 23, as authorities in support of the decision he came to, as well as to the cases of the *Union* and the *White Squall*, 4 Blatchford C. C. R. 90, 103.

In the second case, the *Thales*, the same authorities are referred to, and are considered to settle the question.

In the *Kalamazoo*, the language used by Dr. Lushington in giving judgment, seems to support the view of the American Judge, but the facts of the case differ very materially from those of the American case. The original arrest was in respect of damage to the ship and cargo, and the Court pronounced for the damage proceeded for, and referred the same to the registrar and merchants to ascertain the amount and report in the usual course. Subsequently it was discovered that the damage to the cargo was to a greater extent, and a second action was commenced on behalf of the same persons who brought the first. It was held that this

(*i*) L. R. 1 A. & E. 8.
(*j*) L. R. 2 A. & E. 5.
(*k*) L. R. 2 A. & E. 330.

could not be done and the vessel was discharged from the second arrest. The particular language of Dr. Lushington relied on is this: "It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action." He follows this however, by saying: "The bail represents the ship, and when a ship is once released upon bail, she is altogether released *from that action*. However, here is, I believe, a perfectly novel attempt to arrest her in a new action. I think where a party has once proceeded before the Court and *recovered judgment*, he is barred from proceeding *in a second action*." The latter words seem to me clearly to limit the meaning of the prior, and at all events the case only establishes that you cannot proceed in a second action for a cause of action which is or may be included in the cause of action in a former suit in which judgment has been recovered. That this is the true meaning, is shewn by the following statement in *Coote's* Admiralty Practice, 2nd ed., p. 19. In stating the ways in which a maritime lien may be extinguished, Mr. Coote says: "It is extinguished by bail being given in the Court of Admiralty to an action instituted in that Court to enforce it. . . . . The extinction, however, in this case is conditional only. If the suit be prosecuted to a sentence or final decree the lien is removed altogether, the satisfaction of it being transferred to the bail. But if there be no adjudication, the lien has only been removed so long as the proceedings have continued, and if the plaintiff has not pressed or voluntarily discontinued his proceedings and afterwards pay the defendant's costs, the *res* is reinvested with the lien and may be again arrested in another action *de eadum causa*."

The authority for this statement is the *La Flecha*, 1 Spinks 439, decided by Dr. Lushington, in July, 1854. The *Kalamazoo* was decided by the same Judge in July, 1851.

The same doctrine is laid down in *Boyd's* Admiralty Practice, at page 39.

The case of the *Bold Buccleugh*, 10 Jur. 134, shews that after a vessel has been arrested by a foreign Court and released on bail the proceedings can be abandoned and she can be again arrested by an English Court, and that the plea of *lis alibi pendens* cannot be maintained. In that case the proceedings in the foreign Court were not abandoned until some time after the English suit was brought, but it made no difference.

I have also been referred to a case of *United States* v. *Ames*, 99 U. S. R. 35, in which it is said the doctrine laid down in the *Thales* has been somewhat qualified.

The case of the *Delta*, L. R. 1 P. & D. 393, shews, at page 464, that the judgment of a foreign Court is only an estoppel when given on the merits, and not when given on a matter of form.

It is clear that no decision on the merits was given by the Court at Sandwich, or by the Court at Detroit. The case never came before the former Court for hearing at all, No answer was put in and the case never went to issue. In the latter case an answer was put in by the present defendants, and it appears from the transcript or exemplification

of the proceedings, that judgment was pronounced dismissing the action without costs on the ground that it was settled.

I am of opinion that the arrest and release on bail at Detroit, do not constitute any defence, and that the judgment given in that case was not a decision on the merits so as to constitute a defence by estoppel.

As to the proceedings at Sandwich, I am of opinion that I am bound to give effect to the law as laid down in *Coote* and *Boyd* and by Dr. Lushington in *La Flecha*, rather than to the American decisions, and to hold that the arrest at Sandwich and release on bail, do not constitute any defence to the present action.

It was argued by Mr. Pattison that since the Judicature Act, the effect of a a non-suit or discontinuance was equivalent to a decision on the merits. I do not consider the Judicature Act applicable to proceedings in the Maritime Court, but if it was, it is provided by Rule 170, that the plaintiff may, before receipt of statement of defence or after the receipt thereof, before taking any other proceedings in the action (save any interlocutory application) by notice in writing filed and served, discontinue his action, and by sub rule (a) such discontinuance shall be no defence to any subsequent action.

There can be no doubt that it is a hardship on the vessel-owner that his vessel should be liable to several arrests, and he be compelled to give several bonds to obtain her release. It must not be forgotten, however, that to give effect to the defendant's construction would be to destroy the plaintiff's lien, a consequence still more severe.

If any mode was pointed out by which any reasonable redress would be given to the defendants, I would gladly adopt it. The contention of the defendants, however, is that the lien is gone altogether.

The reason given by the petitioner's counsel for abandoning the suit at Sandwich, is that the barge was afterwards arrested at Detroit, and he feared she might be sold there, seems hardly satisfactory when we remember that he held the bail that had been put in at Sandwich. The reason given for abandoning the suit at Detroit is, that it was found that this suit having been brought before the Sandwich suit was fully discontinued, a defence of *lis alibi pendens* could be successfully pleaded to it. This may be true according to American law. From the cases cited, I should think it probably is so.

It is possible the defendants might have been able to set aside the arrest if they could have shewn an abuse of the process of the Court. They did not, however, attempt this, but merely set up the former arrest as an answer to the action.

As to the merits. The laws regulating the order of competing liens is laid down in *Maclachlan* on Shipping, 2nd ed. p. 652. "Seamen's" wages have priority over all other claims. A master's wages and disbursements rank after the seamen's wages and prior to all other claims, notwithstanding he is a part owner, excepting, however, such claims as he has made himself liable to in the capacity of master. He is therefore obliged to give precedence to a claim for bottomry if he has bound himself in the bond, for his own shares are included in the charge, as for necessaries ordered by himself.

The master of a ship had originally no lien for his wages, but by the Merchants' Shipping Act of 1854, he was given the same rights, liens and remedies for their recovery which any seaman had. His lien thus depends upon statute law. It was not disputed that in a proper case this Court has the power to enforce it.

I am of opinion that the defendants were mortgagees of the steam barge and not the real owners, though registered as such.

I also think they were not in possession until November, 1882, when Mr. Wigle instructed the petitioner to pay the money earned by the vessel to him. I also think that although the defence of the petitioners being a part-owner was not set up by the defendants in their answer, I am bound to consider it; The *Fevonia*, L. R. 2 A. & E. at p. 71.

I think, however, that the relationship of mortgagees and mortgagor is not made out between the defendants and the petitioner so as to postpone the lien of the petitioner to the defendants. Whatever may have been the arrangement between the petitioner and Mr. C. N. Pratt (and I think the statement of Mr. Pratt as to it more probable than that of the petitioner) it was not recognized by the defendants; on the contrary, the petitioner distinctly disclaimed any interest in the barge—no doubt at the instance of the defendants, before the agreement of the 29th December, 1881, was entered into by Pratt and Wigle, under which the last advance was made, and in accordance with which the barge was registered in Wigle's name, and the shares divided between him and Callaway. The petitioner was no party to any of the advances. He executed no mortgage or covenant. He incurred no personal responsibility to the defendants, a point which was considered of importance in the *Jenny Lind*, L. R. 3 Adm. 532, as distinguishing it from the *Fevonia*, L. R. 2 Adm. 68.

The position which the defendants now wish to place the petitioner in is inconsistent with that which they compelled him to assume on the 29th December, 1881. The petitioner was bound by the position he took then. He could not have asserted any interest in the barge afterwards had it been his advantage to do so. Why should the defendants now be allowed to do so to his disadvantage, and thus deprive him of a right he would clearly be entitled to if his declaration was really true, a right which any other master (not a part owner) would have.

If the defendants were mortgagees in possession they would be liable to the petitioner. They were so after 1st November, 1882. I am of opinion that the petitioner has made out his lien for wages at $800 per annum from 1st February, 1882, to 4th May, 1883.

I am not satisfied that I can award any double pay against the vessel for delay in payment.

THE WALTER S. FROST.

Answer in cause of collision—Pleading—Demurrer and defence combined—Tender and payment into Court with denial of liability—Maritime Court Rule No. 38.

The plaintiff in the petition charged the defendant with negligently colliding with a lock gate in a canal, whereby the plaintiff's land was flooded.

Held, that a general denial of the alleged negligence was sufficient, and that the defendant was not bound to plead all the circumstances of the collision.

The Court refused to strike out a paragraph of the answer which in fact amounted to a demurrer.

Held, that a plea of tender and payment into Court cannot be pleaded with other defences.

This was a cause of damage instituted by Harriet S. Clark, the owner of a farm lying adjacent to the Welland Canal, near Lock No. 5, against the propeller *Walter L. Frost*, one of the Ogdensburgh line of steamers.

The petition (filed 10th May, 1884), alleged that the *Frost*, on her way up the canal, entered Lock 5, and was there "negligently, carelessly and unskilfully navigated and managed by the master and crew in charge thereof, and by reason of such negligence and carelessness, and through the sole fault of said master and crew, the said vessel was allowed to run with great force and collide against the head-gates of said lock, and thereby broke and carried away the same, in consequence whereof the water in said canal above said lock rushed down with great force and volume, and overflowed the side of said canal, and rushed in a torrent over and through the plaintiff's farm, destroying fences and crops, and carrying away soil therefrom," and the plaintiff claimed $1,200 damages.

On 13th June, 1884, an answer was filed on behalf of the owners of the *Frost*, which was substantially as follows:—1. The accident was not caused by any fault of the defendants or their servants. 2. In any event there is no legal liability upon the defendants to pay the claim, but the Government of the Dominion of Canada is solely responsible for the damages. 3. The plaintiff did not own the farm or crops injured. 4. The plaintiff's estimate of the damage is grossly exorbitant. 5. Before action the defendants tendered $200 in full of the plaintiff's claim, which the plaintiff refused to accept. The defendants were and are ready and willing to pay this sum, and now bring it into Court, in full satisfaction of the said claim.

On 18th June, 1884, *R. Gregory Cox*, for the plaintiff, moved before E. J. Senkler, Esq., Surrogate Judge in Chambers, for an order, (1). To strike out the first clause of the answer on the ground that the same is vague and unusual. (2). To strike out the second clause as irregular and embarrassing. (3). To strike out all of the clauses of the answer, except that raising the plea of tender and payment into Court; on the ground that they are inconsistent, irregular and embarrassing.

The first clause of the answer is objectionable, because in collision cases it is the practice in Admiralty to compel the defendants to set out in detail the circumstances attending the collision; the *What Not* (*a*). In this case all the facts are peculiarly within the knowledge of the defendants, and they should be compelled to show by their pleading how the accident occurred, and not be allowed simply to traverse the allegation in the petition.

The second clause is objectionable as amounting to a demurrer, if anything, to the petition.

(*a*) L. R. 2 A. & E. 265.

As to the third point, it is quite clear that at Common Law, the plea of tender and payment into Court could not be combined with a plea denying the defendant's liability.

The practice of the High Court of Admiralty, which governs the practice in this court, was the same. The practice introduced by the Judicature Act does not apply to this Court has already been decided in the *C. N. Pratt* (*b*). "Tender by Act in Court," or in other words, payment into Court, is a long established practice in the Court of Admiralty.

J. C. Rykert, Q.C., contra, contended that the answer was unobjectionable. The practice of combining a plea of tender with a denial of liability is introduced into the High Court of Justice by the Judicature Act, and should be followed in this Court.

SENKLER, Sur. J., 10th September, 1884.—The plaintiff asks to strike out the first paragraph on the ground that it is vague and unusual, and contends on the authority of the *What Not*, that in cases of collision the defendant cannot rely on a simple negative, but must state the circumstances relating to the collision. That case was one of collision between two vessels, and in it the rule is undoubtedly laid down as contended for by Mr. Cox. It is, however, a rule peculiar to cases of collision and is applicable to both parties, requiring the plaintiff as well as the defendant to give their version of what occurred before and at the time of the collision. I think this rule is a most beneficial one, and one which ought to be enforced in all cases of collision between vessels, but I do not think it applicable to the present case, which is a case of collision between the *Frost* and the lock-gate at Lock No. 5. The plaintiff has simply charged negligence generally in his petition, and made no particular statement of what took place; and I cannot say the charge is not properly answered.

The second paragraph is also moved against, as being irregular and embarrassing. This paragraph is no doubt in effect a demurrer to the plaintiff's claim. It states no new matter of fact, and denies the liability of the defendants on the facts as stated. A demurrer would do the same as this. It seems, however, from Leggo's Chancery Practice, p. 382, *et seq.*, that although a demurrer is recommended in many cases, the defence that no cause of action is shewn can be raised at the hearing, subject to the penalty of defendant being allowed only the costs of a demurrer, in case the Court thinks a demurrer should have been filed. I decline to strike out this paragraph.

The third application is to strike out all the paragraphs of the answer except the last, on the ground that they are inconsistent, irregular, and embarrassing. No. 38 of the Rules of the Maritime Court, settled by the late Judge of the Court on 31st December, 1877, and approved by the Governor-General in Council on 8th February, 1878, directs that "the mode of pleading in this Court and the effect of the pleadings, subject to the provisions of these rules, shall be, as far as applicable, similar to the mode of pleading now in force and the effect of pleadings in a suit in the Court of Chancery, at Toronto, and the powers of the Court or Judge or Surrogate Judge, in respect of pleadings and their effect, shall as far as applicable be the same as the powers of the said Court of Chancery or a Judge thereof." Mr. Cox did not refer me to any authority upon the

(*b*) Ante p. 417.

effect of a tender in the Court of Chancery, and I have experienced much difficulty in finding any decision on the point. In *Holmested's* Chancery Orders, p. 251, it is said that a tender should be set up by statement of defence. This has reference, no doubt, to the practice since the Ontario Judicature Act of 1881, and does not touch the question now being considered. I have not been able to find any reference to the effect of a tender in Mr. Leggo's work, although at p. 1486 he describes the requisites of a tender to be effectual, and says, "if a tender is not legal, a Court of Equity will not support it, nor will it supply a defect in a tender against a rule of law, unless perhaps where fraud is used to prevent its operation." At law there is no doubt that before the Judicature Act of 1881, a defendant could not plead a tender together with any other plea to the same cause of action (*c*). And the same rule applies to payment into court (*d*). Of course when a declaration is of a general character or on the common counts or in trover, a defendant could plead other pleas as to the residue, without admitting any particular cause of action. When the declaration was special the payment into court was an admission of the cause of action set out. In the absence of any authority to the contrary I cannot doubt that the effect of pleading a tender or paying money into court as an admission of liability was the same in equity as at law, and that such a defence would not be set up with any other defence to the same identical cause of action. No objection was taken to the tender on the ground that a tender cannot be pleaded to an action founded on a wrong, as the present action is. I am of opinion, however, that at law a tender could properly only be pleaded to a debt or cause of action arising from a debt. It cannot be pleaded to a count for unliquidated damages (*e*).

And I cannot find any case of tort in which it can be made or pleaded, except under special statutory enactment in favour of Magistrates or others performing public duties. The proper remedy seems to be payment into court. The practice in the Admiralty Court in England, however, allows tender more generally (*f*), where it is said that in all actions in which plaintiff's claim is capable of being satisfied by payment of money, the defendant if he intends to dispute the amount only of the claim may tender such a sum as he considers sufficient.

Under the Ontario Judicature Act of 1881, payment into Court can be pleaded with other pleas denying the cause of action, and probably tender can also, but this is not yet applicable to the Maritime Court. I cannot allow both defences to remain in the defendant's answer, I will however, allow the defendant's solicitors two weeks to decide how they will amend the answer. *i.e.*, whether they will rely upon the tender or the other branch of the defence. If they wish to rely on the plea of tender they may turn it into one of payment into court. If they do not amend within that time, all the paragraphs except the last will be struck out. As the matter is new the costs of the application and amendment will be costs in the cause to the successful party.

(*c*) 1 Wms. Saund. 33 *f*, note *m*.
(*d*) 1 Wms. Saund. 33 *l*, note *o*.
(*e*) *Dearle* v. *Barrett*, 2 Ad. & E. 82.
(*f*) *Williams & Bruce*, Ad. 257.

NEW BRUNSWICK.

In the Supreme Court.

REGINA v. BLAIR; *In Re* HICKEY.

Canada Temperance Act, 1878—*Conviction uncertain as to time of offence—Amendment—Section* 118.

To sustain a conviction, the evidence must be reasonably sufficient to shew that the offence existed and was committed at the time of the information, and the facts necessary to support the charge must be stated expressly and not left to be gathered from inference or intendment.

Therefore where a conviction under "The Canada Temperance Act," made on the 4th August, stated that the defendant had sold spirituous liquors "within three months now last past," and the evidence of one witness proved a sale in May previous to the information (which was laid on the 25th July), and another witness proved a sale "since the 22nd June" then last;

Held, that the conviction was uncertain, as it was consistent with the evidence that the magistrate might have convicted on the testimony of the witness who proved a sale "since the 22nd June," which sale might have been after the date of the information.

Held, also, that the conviction could not be amended under the 118th section of the Act.

REGINA v. BLAIR; *In Re* McCARTHY.

Canada Temperance Act, 1878—*Conviction uncertain—Amendment—Section* 118.

Where a conviction under "The Canada Temperance Act" stated that the defendant had sold "spirituous *or other* intoxicating liquors," and the proof was a sale of brandy, the conviction was amended under sec. 118 of the Act by striking out the words "spirituous or other."

Quære, whether "spirituous" and "intoxicating" are not synonymous expressions, and the conviction therefore not uncertain.

Ex parte GROVES; *Ex parte* McDONALD.

Canada Temperance Act, 1878—*Previous conviction—Whether defendant must be present at hearing.*

Held, Weldon and Wetmore, JJ. dissenting, that a defendant may be convicted of a second offence under the "Canada Temperance Act, 1878, sec. 122, though he is not present at the trial to be asked as to a previous conviction.

REGINA v. BLAIR; *In Re* KEARY.

Canada Temperance Act, 1878—*Conviction uncertain—Amendment—Section 118.*

An information under "The Canada Temperance Act, 1878," was laid on the 25th July, charging defendant with having sold spirituous liquors within three months then last past. The hearing took place on the 4th August, and the conviction, dated that day, found defendant guilty of selling intoxicating liquors "within three months last past." One witness proved a sale "about two weeks" before his examination, and others respectively proved sales "within a month," and "sometime last month."

Held, that the conviction was bad for uncertainty as it was quite consistent with the evidence of some of the witnesses that the sales of liquor which they testified to might have been after the 25th July (the date of the information), and that the conviction could not be amended.

Ex parte PERKINS.

Parish Court Commissioners—Jurisdiction to try offences under Canada Temperance Act—Appointment of by the Local Government—Justices of the Peace.

Held, (i) that Parish Court Commissioners have jurisdiction to try offences under "The Canada Temperance Act, 1878."

(ii) Following *Ganong* v. *Bayley*, 1 P. & B. 324, and *Ex parte Williamson*, 24 N. B. Rep. 64, that the Local Government has the right to appoint Parish Court Commissioners and Justices of the Peace.

Ex parte WILLIAMSON.

Justices of the Peace—Appointment of by the Local Government.

The Local Government of this Province has power to appoint Justices of the Peace.

Ganong v. *Bayley*, 1 P. & B. 324, followed.

MORAN v. TAYLOR.

Commission to examine witnesses — Return—Address to Supreme Court—Marine insurance—Whether damage to ship must be repaired at port of discharge—Particular average—Place of adjustment—Policy—Warranty not to enter or attempt to enter Gulf of St. Lawrence before day named—Meaning of— Amendment.

A commission for the examination of witnesses in England was returned indorsed with the title ot the Court and cause, signed by the commissioners and addressed to the clerk of the Circuits of the county in which the venue was laid.

Held, sufficiently addressed to the Court.

A ship was insured for a voyage from Liverpool to Quebec. The policy contained a clause that the ship should not enter, or attempt to enter, or use the Gulf of St. Lawrence before the 10th May, nor after the 30th October, and the seaward line of the Gulf was defined. The ship sailed from Liverpool in April, and on the 7th May ran into field ice near Newfoundland, about 60 miles to the east of the defined line of the Gulf, and the weather being stormy she was injured by the ice. After getting clear of the ice she proceeded to Quebec (not entering the Gulf till after the 10th) where her injuries were examined, and she was partially repaired, and sailed for Liverpool with a cargo of timber. It did not appear that she had received any injury on the voyage to Liverpool. On her arrival there she was put into dock and carefully examined, and her injuries found to be such as would probably have been caused by her being in the ice.

Held, (i) Per Allen, C.J., Wetmore, Palmer and Fraser, JJ., Weldon, J., dissenting, that though the ship was proceeding towards the Gulf of St. Lawrence at the time she got into the ice, she was not attempting to enter the Gulf within the meaning of the clause in the policy, and that the underwriter was liable for the damages sustained.

(ii) That it was not necessary that the amount of damage to the ship should be adjusted at Quebec, but it might be done at Liverpool.

(iii) There was evidence that the injury to the ship was caused by the ice, during the voyage to Quebec, and not on the voyage to Liverpool. (iv) A skilled witness could not be asked whether, in his opinion, considering the course and position of the ship and the state of the wind at the time she got into the ice, she was not attempting to enter the Gulf? or, Where was she bound, &c

Per King, J. That the clause against entering the Gulf was not applicable to a voyage policy.

RICHARDSON v. VAUGHAN.

Pleas—False or embarrassing—Setting aside—Summary application.

Declaration stated that the defendant was one of the part owners of a ship, and as such was with the other part owners, indebted to plaintiff on a bill of exchange drawn by W. S., the master of the ship, for £753, on S. V. & Co. of Liverpool, payable to plaintiff's order, sixty days after sight; that the plaintiff had placed the bill of exchange in the hands of his attorney for collection from defendant and the other owners of the ship; that afterwards defendant requested said attorney to delay proceedings on the bill until the vessel's arrival at Saint John; and in consideration that the attorney did so delay, defendant promised plaintiff to make immediate payment to him of said bill of exchange on arrival of the ship

at Saint John; and did also for the consideration and on the conditions aforesaid, promise to pay him another bill of exchange for £173, drawn by said W. S. on S. V. & Co., payable to plaintiff's order; that the said attorney with plaintiff's consent did delay proceedings on the first mentioned bill of exchange till the arrival of the ship, and all things happened, &c., necessary to entitle plaintiff to be paid the said last mentioned bill of exchange, yet defendant had not paid the same.

The defendant pleaded, 1st. That he did not promise as alleged. 2nd. Payment before action brought. 3rd. That before action brought, he satisfied and discharged plaintiff's claim with respect to the first mentioned bill of exchange. 5th. That said W. S. was induced by plaintiff to draw the second mentioned bill of exchange to defraud defendant and the other owners of the ship, and plaintiff concealed this fraud from defendant, &c., and that before action defendant paid the residue of plaintiff's claim in the first count mentioned.

On application to a Judge at Chambers, on an affidavit of the plaintiff's attorney stating that the defendant had paid him the amount of the £753 bill, but had not paid the £173, and he believed it was not paid to the plaintiff (who resided in Savannah)—there being no affidavit of the defendant that he had paid it, but merely that the plea was true in fact—the second plea was set aside as false, under the authority of the Con. Stat. cap. 37, sec. 88; the third, as embarrassing; and that part of the fifth plea which alleged payment of the residue of the plaintiff's claim as false and embarrassing.

Held, that the fifth plea was good, and that so much of the Judge's order as set it aside in part, should be rescinded. But, Palmer, J., dissenting, that the order to set aside the second and third pleas was properly made.

STAR KIDNEY PAD Co. v. McCARTHY.

Foreign judgment—Action by Company—Pleading—Whether declaration must state incorporation.

In an action brought by a company on a foreign judgment, where the declaration stated that the defendant had appeared in the original suit,

Held, by Allen, C. J., Weldon, King and Fraser, JJ., Wetmore and Palmer, JJ., dissenting, that the incorporarion of the plaintiffs need not be alleged in the declaration.

The Waterous Engine Works Co. v. *Campbell*, 22 N. B. Rep. 503, distinguished.

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JUDICIAL DEVELOPMENTS OF THE STATUTE OF FRAUDS.

FOR many centuries it has been laid down as an elementary principle that a rule can be found in the common law for the determination of every controversy which can possibly arise relating to property and civil rights. If in any case a satisfactory rule cannot be ascertained, the deficiency is usually attributed to a want of ability or industry on the part of the person who seeks to discover that rule.

A tendency is, however, observable among modern jurists to discredit this time-honoured view. Mr. Justice Stephen, in a late publication (*The Nineteenth Century*, January, 1880, page 152), states that the principle upon which Judges proceed in deciding cases may be defined as "the exercise of a modified power of legislation." Legal writers of the more advanced school contend that it is absurd to attribute to past generations of Judges such an insight into the future, as to enable them to anticipate the use which might be made of their dicta and decisions long after they themselves should have passed away from the scene of life. They suggest that it is better to abandon this ancient idea that the common law is an inexhaustible reservoir of legal principles, and to recognise explicitly, what is practically conceded by every reflecting mind, that the Judges do

actually make law. But before removing the landmarks of the law, it would be well to bear in mind the maxim of Lord Bacon *Omnis innovatio plus novitate perturbat quam utilitate prodest* (*a*). The disturbance resulting from an innovation is so great an evil as to outweigh any benefit that might arise from it.

But the existing principles of judicial decision have a solid, logical, and argumentative basis. The expression "common law" has two perfectly distinct meanings. It means, first, those principles set forth in an explicit form in the Reports, upon which the Courts in the past have disposed of questions involving life, liberty, or property. It is essential to the binding force of the principles thus enunciated, that they should have been stated in the determination of a *bona fide* controversy between actual litigants, in a suit in which each of them has the strongest inducement to point out a fallacy in the argument of his opponent, if that argument is unsound. Cases have occurred, in which the Courts, suspecting that the controversy was carried on simply to obtain a decision upon an abstract point of law, have refused to proceed until an affidavit should be filed stating that the suit was carried on for the purpose of determining a *bona fide* claim. But when a decision has been arrived at in a real suit, the effect of that decision is not only to determine the rights of the parties to that suit, but also to lay down a rule to which all who owe allegiance to the government, and all who claim the protection of the laws, are bound to conform. If the common law is the perfection of reason, as stated by Lord Coke, these principles may be defined as reason in an explicit form.

But the term "common law" has another meaning which may be defined as "implicit reason." The decided cases are authorities not only for the propositions which they expressly affirm, but also for those propositions which are involved by necessary or reasonable implication in the doctrines expressly affirmed. Propositions of law which can be referred to the second class may remain latent in the

(*a*) *Broom's* Legal Maxims, p. 147.

decisions for centuries until an occasion arises to develop them in order to dispose of existing controversies. When such an occasion arises the Judges draw forth from the decided cases, and state in an explicit form, a rule of law which had always existed in an implicit form, although no controversy had hitherto arisen of such importance as to call for an authoritative statement of the law. It may be said that Judges are guided solely by their own views of justice or expediency in affirming any doctrine as part of the common law. But, as has been said, they are authorized to develop the law only when sitting to determine an actual controversy, and after having heard counsel in support of conflicting views. The experience of a thousand years has shown that the system is admirably adapted to the wants of the people.

These principles being applicable as well to the interpretation of statutes, as to the development of the common law, it is proposed to consider the operation of the Statute of Frauds upon contracts as the statute has been interpreted and applied by a series of judicial decisions.

In the process of developing the principles of law by which this enactment should be construed, there was a material fallacy which perverted the reasoning of the Judge. It was assumed that the statute intended to make void those contracts to which its language extended, unless certain formalities should have been observed. But the statute does not say that they shall be void. It declares that no action shall be brought to enforce them. It appeared to some Judges that if no action could be brought upon a contract it could not be called a contract for any purpose. They held that if the statute applied to a contract and there was no evidence that its requirements had been complied with, the contract was not merely voidable, but void.

But it had always been held that if a plaintiff, suing upon a contract governed by the statute, was able to produce in evidence at the trial a memorandum signed by the defendant, he had done all that the law required; even although, because he himself had signed no memorandum the de-

fendant had no reciprocal remedy against him. The contract could hardly be valid when looked at from one standpoint and wholly void when looked at from the other (*b*).

The case of *Carrington* v. *Roots* (*c*), furnishes an illustration of the distinction between a void and a voidable contract, although the language of the Court in delivering judgment would appear to deny such a distinction. But it is an elementary principle that a case is an authority only for the proposition of law which the Court are compelled to affirm in order to dispose of the matter before them. Any observations which do not fall within this rule may be rejected as *obiter dicta*. Of such a character are the observations of the Judges in this case, in which the contract in evidence is referred to as a void contract. The facts and pleadings in this case are as follows: An action of trespass was brought against the defendant for taking the plaintiff's horse and cart. Plea, that the horse and cart were encumbering the defendant's close, wherefore he distrained upon them as he lawfully might. Replication, that the defendant had sold to the plaintiff the crop of grass growing on the *locus in quo*, and that the plaintiff had entered upon the close with his horse and cart for the purpose of cutting and carrying away the grass. Rejoinder, that no such contract was made; upon which issue was joined. The plaintiff at the trial failed to give evidence of any contract in writing, but he contended that it was not necessary that he should give such evidence—that he had brought an action of trespass and not an action *ex contractu*, and that the statute did not make the contract void, but simply declared that no action should be brought to enforce it. The defendant, on the other hand, contended that the decision of the case must turn upon the validity of the replication; that the plaintiff had alleged upon the record that a contract had been made between the parties, and that he was bound to prove a contract valid under the Statute of Frauds. It was conceded by the defendant that the contract might be made

(*b*) *Leroux* v. *Brown*, 12 C. B. 801.
(*c*) 2 M. & W. 248.

available for some purposes. For instance, it might enure as a license. If the plaintiff had treated the contract as a license to enter upon the close, and had drawn the replication in accordance with that view, the defendant might have rejoined a revocation of the license, and the point at issue would have been simply whether the revocation was reasonable. The Court sustained the defendant's contention. That contention was, not that the contract was void, but that it was voidable. The Court, however, go far beyond this contention, and say that if a suit cannot be brought upon a contract, it can be of no avail as a contract at all. It must be void.

The fallacy, that because no action can be brought upon a contract, that contract is void to all intents and purposes, has led to many decisions contrary to law. For instance the Supreme Court of New Brunswick held in *Clarke* v. *Scottish Imperial Insurance Company* (*d*), that no insurable interest could arise out of a contract which was incapable of being sued upon under the provisions of the Statute of Frauds. In that case, it appeared that the plaintiff had made advances to one Bishop to be expended in the construction of a ship upon which the plaintiff should have security for the repayment of those advances. But this agreement had not been reduced into writing. The plaintiff effected insurance with the defendant to cover those advances. A loss having occurred, the defendant contended that inasmuch as the contract for making the advances and giving the security upon the ship was not binding under the Statute of Frauds, the plaintiff had no insurable interest. The Court sustained this contention and ordered a non-suit to be entered. But this decision was reversed on appeal to the Supreme Court of Canada (*e*). The Supreme Court of Canada point out that it is not necessary that the plaintiff should have a legal interest in the subject of the insurance; that an equitable interest is sufficient; and that although the contract was not capable of being sued upon at law, yet it was one of which a Court of Equity would decree specific

(*d*) 2 P. & B. 240.

(*e*) 4 S. C. R. 192.

performance in accordance with the doctrine laid down by Lord Westbury, L.C., in the case of *Holroyd* v. *Marshall* (*f*).

There has been a greater fluctuation of judicial opinion with reference to the equitable doctrine that part performance takes a case out of the Statute of Frauds, than with reference to almost any other doctrine known to the law. The latest authoritative expression of opinion on the subject is one of regret that any departure should have been allowed from the plain words of the Act. In one of the earliest cases on the Act (*g*), it appeared that an agreement had been made for a loan to be secured by an absolute conveyance of the real estate of the borrower, the lender agreeing to execute a defeasance. The conveyance was executed and delivered; but the lender refused to execute the defeasance. The Court decreed that he should execute an instrument of that nature. The decision turned on the fraud of the lender in inducing the borrower to part with his estate without any intention of executing the instrument by which the right of redemption could be proved. But the reason of this decision would not extend to a case where the instruments intended to be drawn up have been actually executed, but nevertheless fail to answer the purpose designed. The case of *Hunt* v. *Rousmaniere* (*h*) illustrates this view. The elaborate judgment of Marshall, C.J., in that case fully justifies the reputation which he bears as one of the ablest jurists that ever lived. It appeared that a debtor was willing to give his creditor security for the debt in the form of a mortgage of a ship. The creditor objected that if he should accept such a security he might be compelled, when the ship should arrive in port, either to take possession of her, or to incur the risk of losing his security, if some other creditor should issue an attachment. It was then suggested that a power of attorney to sell the ship should be given. It was thought that such a power, being given for a valuable consideration, could not be revoked. This security was accordingly drawn up. The debtor died

(*f*) 10 H. L. C. 191.

(*g*) Referred to in *Joynes* v. *Statham*, 3 Atk. 388.

(*h*) 1 Peters 1.

before the creditor had acted under the power of sale. The creditor filed a bill against the administrator of the debtor, praying that his debt might be declared to be a lien upon the ship. The Court dismissed the bill. Here it is evident that the power was not "coupled with an interest." The power must first be exercised, and extinguished in that process, before the fund comes into existence out of which the creditor is to be paid. The interest follows, and is not coupled with the power. When the creditor, in a case like this, exercises the power, he assumes to act on behalf of his principal; and he does an act which derives all its validity from the idea that the creditor could have done the act himself. But if the principal is dead he cannot do the act. Consequently the agent cannot do it; and the security becomes wholly void. Now if the Court had looked upon the giving of the power of attorney as a part performance of a contract whereby it was the intention of the parties that a valid security should be given, they would simply be using the equitable jurisdiction to protect a person from the consequences which flow from ignorance of law.

At one time it was held that where on a verbal contract for the sale of land the whole, or a considerable part, of the purchase money had been paid, there was a part performance sufficient to satisfy the Act. But it is now clear law that such a payment is not sufficient (*i*). The money may be recovered from the vendor in an action for money had and received by him to the use of the vendee. But it would seem that the vendee must prove a demand of a conveyance from the vendor, and a refusal by him, before commencing the action. For, as it is clear that the contract is not void but voidable, the purchase money, if it is actually received by the vendor, may be retained by him, if he is willing to perform his part of the contract. But where, upon demand, he refuses to deliver the conveyance, the contract is rescinded, and a new contract is implied that the money shall be held, not under the contract which no longer exists, but to the use of the vendee from whom it was originally received.

(*i*) *Clinan* v. *Coake*, 1 Sch. & L. 40, 41.

The case of *Jones* v. *Jones* (*j*) illustrates the manner in which the Court has applied the doctrine of part performance. An action was brought on a promissory note. The defendant pleaded that he made a verbal agreement with the plaintiff for the purchase of a parcel of land, and that he gave the note on account of the purchase money and not otherwise. The plaintiff replied that he put the defendant in possession of the property in pursuance of the contract of sale, and that the defendant had made a part payment. The defendant demurred, and contended that the replication was objectionable, on the ground that it alleged two matters in answer to the plea, whereas one only should have been pleaded. But it is an elementary rule in pleading, that a demurrer opens up a whole record; and the judgment is given against him who makes the first mistake in pleading. The question, therefore, turned upon the validity of the plea. The defendant contended that the plaintiff was really attempting to enforce a parol agreement for the sale of land, that, if the money should be paid, the plaintiff could not retain it, inasmuch as payment was not a part performance. The Court sustained the plaintiff's claim on the ground that it did not appear from the plea that the plaintiff had refused to convey the land. The plea should have shown the rescission of the contract by alleging the refusal of the plaintiff to convey the land on request.

If land is in possession of a tenant who makes a verbal contract for the purchase of the reversion, his possession is not a sufficient part performance, because the tenancy sufficiently accounts for the possession. This view seems to be denied in *Nunn* v. *Fabian* (*k*), where it appeared that a landlord had verbally agreed with his tenant to grant him a new lease at an increased rent, with the option of purchasing the freehold. The landlord died before the execution of the lease. Before his death, the tenant paid one quarter's rent at the increased rate. Held, that this was a sufficient part performance. But the authority of *Nunn* v. *Fabian* was shaken by the case of *Humphreys* v. *Green*

(*j*) 6 M. & W. 84.

(*k*) 1 Ch. App. 35.

(*l*), and it must be held to be overruled by *Madison* v. *Alderson* (*m*).

In the case of *Britain* v. *Rossiter* (*n*), it appeared that a verbal contract had been made on a Saturday between a merchant and a clerk for the employment of the clerk for one year from the Monday following. The clerk entered upon the service, but having been dismissed before the expiration of the year, he brought an action for wrongful dismissal. The Court held the contract to be within the statute because it was incapable of complete performance within a year from the time when it was made. It was then contended that the plaintiff, by entering upon the service, had partly performed the contract; and that this part performance was sufficient to satisfy the statute. But the Court was of opinion that the idea of part performance applies to contracts for the sale of land only, and not to contracts for personal service. The Court stated in the most explicit terms that the contract sued upon was not void, but voidable only; and that the services rendered must be referred to that contract, and could not be referred to any new implied contract. The original contract subsisted until it was rescinded by the agreement of both parties. And as the original agreement could not be enforced, and no new contract had arisen, the Court held that the plaintiff had no remedy at all.

The application of the statute to parol trusts relating to land must now be referred to. The statute says that such trusts are void. But in order to understand the limits of the doctrine it is necessary to refer to the decided cases. In *Bartlett* v. *Peckersgill* (*o*), it appeared that the plaintiff had instructed the defendant to buy for him a parcel of land, but had furnished him with no funds for that purpose. The defendant, having obtained a conveyance in his own name, refused to convey the land to the plaintiff. The plaintiff filed a bill for the specific performance of the

(*l*) 10 Q. B. D. 186.
(*m*) 8 App. Ca. 480; see *Magee* v. *Kane*, ante, p. 317.
(*n*) 11 Q. B. D. 123.
(*o*) 1 Eden, 515; and see note in 4 East, 577.

contract, and the defendant relied upon the Statute of Frauds. Lord Keeper Henley dismissed the bill. "The reason for making the statute," says his lordship, "was the confusion of property owing to perjury, either for money or affection. The statute says, no trust shall be of land, unless there be a memorandum in writing, except such trusts as arise by operation of law. It is not like the case of money paid by one man, and a conveyance taken in the name of another. Here the bill charges that the estate was bought with the plaintiff's money. If the defendant say he borrowed it of the plaintiff then the proof will be whether the money were lent or not. If it were not lent then the plaintiff bought the land" (*p*). What the Lord Keeper means in these latter sentences is, that if a bill should be filed charging a resulting trust because land was bought with the plaintiff's money, the defendant might say in his answer, 'the money which the plaintiff gave me was not his money, because, so far from employing me to buy an estate for him with his money, he lent it to me in order that I might buy it for myself.' If the plaintiff did lend the money to the defendant to purchase land, the statute would not prevent a suit by him to recover the money. And if the purchaser, acting as agent for another under a parol authority, advances his own money in the purchase of land, and takes the conveyance in his own name, the case of *Bartlett* v. *Peekersgill* would not preclude him from recovering the money in an action against his principal for money paid to his use and at his request. Such an action would not be founded upon a parol trust relating to land, and authorities are numerous that in cases governed by the Statute of Frauds the remedy need not be reciprocal.

The case of *Lincoln* v. *Wright* (*q*) illustrates the doctrine of part performance. In that case the owner of land conveyed it by way of mortgage. He then became insolvent, and assigned his property to trustees for the benefit of his creditors, remaining, however, in possession of the mort-

(*p*) The quotation is from the note in East.
(*q*) 4 DeG. & J. 16.

gaged estate. He then induced the defendant to purchase the estate from the mortgagee and the trustee, and hold it on his account. The defendant effected the purchase with his own funds, and claimed to hold the estate discharged of equities. The Court held that the possession of the plaintiff could only be accounted for on the supposition of a contract of sale and that such possession must be treated as part performance. They therefore decreed specific performance of the contract.

In the case of *Haigh* v. *Kaye* (*r*), a bill was filed praying that the defendant should be decreed to convey to the plaintiff certain real estate held in trust for the plaintiff. It appeared that the plaintiff, being involved in litigation in which he feared an adverse decision, conveyed the estate to the defendant to hold on his account, to collect the rents, and to execute a re-conveyance on request. The defendant in his answer admitted the facts upon which the plaintiff relied, but set up the Statute of Frauds. He contended that the plaintiff was relying upon a parol trust contrary to the statute. But the Court said that it was clear that the statute was not intended to apply to a case of clear deliberate fraud. The words of Lord Justice Turner in *Lincoln* v. *Wright* (*s*), where he said, "The principle of this Court is that the Statute of Frauds was not made to cover fraud," express a principle upon which this Court has acted in numerous cases where the Court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property, which he has obtained by fraud. The Court say that they will not enforce an immoral agreement, but that if the defendant means to hold the property given to him for an immoral purpose, in violation of all honour and honesty, he must clearly put forward his own scoundrelism if he means to reap the benefit of it.

In the case of *Heald* v. *Pilley* (*t*), it appeared that A. had instructed B., as his agent, to purchase property from C.

(*r*) 7 Ch. App. 469.
(*s*) Supra.
(*t*) 4 Ch. App. 548.

The agency was created by parol, and the agent was not furnished with funds by the principal. B. made a written contract with C. for the purchase of the estate in his own name. Before a conveyance had been made in performance of this contract A. filed a bill against B. and C. for a specific performance of the agreement. The defendant contended that the bill should be dismissed on the authority of the case of *Bartlett* v. *Peekersgill.* But the Court held that B. the agent was made a party to the suit merely that he might be bound by the decree; that the authority of the agent need not be in writing; and that as the plaintiff was identified with the agent, there was evidence of a written contract to satisfy the statute. They point out this distinction from *Bartlett* v. *Peekersgill,* that in that case the contract had been performed by the conveyance of the land to the agent, but in the case before them no conveyance had been executed. *Giffard,* L.J., however says, "I cannot help thinking, as regards that case, that it seems to be inconsistent with all the authorities of this Court which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud."

Notwithstanding this hostile criticism, it is submitted that *Bartlett* v. *Peekersgill* is good law. If the doctrine which it lays down were not law, then no man who had made a purchase of real estate on advantageous terms, would be safe from the attack of any person who should not hesitate to sustain fraud by perjury, and who should claim that the purchase was made on his behalf.

A very important question on the construction of the statute is not yet settled by authority and remains to be determined by the Courts when it shall arise, in accordance with the doctrine of developments to which reference has been made. It is customary for the owners of real estate to make verbal contracts in or about the month of February in each year for the letting of their tenements for one year from the first day of May then next. If these contracts amount to an agreement for a lease they are clearly voidable. But it has been contended that if a contract of this

nature is definite in its terms—if nothing further is to be done by either of the parties to determine the amount of the rent, or any of the conditions, an actual term has been created, which being for a period of less than three years, is valid under the statute. The inclination of the Courts is to decide that such an agreement, however definite, creates merely an *interesse termini*. An interest such as this cannot be enlarged by a release. If the person entitled to that interest should enter into possession of the demised premises, then the *interesse termini* becomes an estate. But before entry there is nothing but an agreement for an interest in land. And this agreement, being by parol, cannot be enforced.

The application of the Statute of Frauds to the question "mortgage or no mortgage," has been determined differently by the English Courts and the Courts of Ontario (*u*).

When the question whether an absolute conveyance can be shown by parol evidence to be a mortgage came before the Court of Appeal in Upper Canada (*v*) over thirty years ago, it appeared to have been a common custom for insolvent traders to convey their lands to their creditors by an absolute conveyance in satisfaction of their debts. The lands at that time were of comparatively little value. However, they subsequently rose in value to an extent far beyond the amount of the debts. The debtors then filed Bills in Equity, praying that the deeds should be declared to be mortgages, and that they might be permitted to redeem on paying the amount of the debt. The fraud was so flagrant in many of the cases, that the Court discountenanced the claim in all of them. They refused relief in all cases, except where the plaintiff's claim was corroborated either by written evidence or by facts and circumstances *dehors* the deed. But they held, without any hesitation, that if a parol agreement had been made for the conveyance of land as a security for a debt, and in pursuance of that

(u) See the article "Mortgage or no Mortgage, admission of parol evidence;" 1 C. L. T. 403, 461.

(v) *Matthews* v. *Holmes*, 3 Gr. 379; 5 Gr. 1.

agreement an absolute deed had been executed, no evidence of the parol agreement could be given because the statute had declared that agreement to be void, and when the deed was looked at, no indication was found there to lead to the inference that the parties intended merely to secure a debt, and not to convey an absolute estate. This view is admitted to be at variance with the English authorities, and is based on the fallacy already referred to, that the contract for giving security in the form of an absolute deed, not being in writing, is void.

But the true doctrine is that laid down by Lord Selborne in *Madison* v. *Alderson* (*w*), that where a contract for the sale of an interest in land has been partially performed by the entry of the vendee into possession and the payment of the purchase money to the vendor, the matter has advanced beyond the stage of contract. Equities have arisen which cannot satisfactorily be adjusted without reference to the verbal contract, evidence of which then becomes admissible, otherwise the statute instead of suppressing fraud would actually become an instrument of deceit and injustice. In the case of the absolute deed, intended to secure a debt, a clearer case arises for the application of Lord Selborne's rule than in a case where no conveyance had been executed but the purchaser had been put in possession. For in the former case the contract to give security has been wholly performed, whereas in the latter case the intervention of a Court of Equity is requisite to carry the contract into effect. In Manitoba, Mr. Justice Taylor, in the case of *Archibald* v. *Goldstein* (*x*), declined to follow the authority of *Bartlett* v. *Peekersgill*. He relied upon the later authority of *Lees* v. *Nuttall* (*y*), as inconsistent with that case. The head note of *Lees* v. *Nuttall* is as follows: "If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal." The agent was not provided with funds by his client. Here,

(*w*) 8 App. Ca. 467.

(*x*) 1 Man. L. R. 8.

(*y*) 1 R. & M. 53; affirmed on appeal, 2 M. & K. 819.

although the contract was verbal, neither in the argument nor in the judgment was any reference made to *Bartlett* v. *Peekersgill*. Nor was the Statute of Frauds mentioned by the counsel or the Court. It is, therefore, clearly impossible to attribute any weight to an authority like this; and the case of *Archibald* v. *Goldstein*, based upon it, cannot be accepted as a correct development of law on the question.

THOMAS MILLIDGE.

EDITORIAL REVIEW.

New Draft Rules.

A pamphlet containing these rules has been printed for the consideration of the Judges.

The greater number of the rules refer to the interior economy of the Accountant's office, and are chiefly noticeable for the fact that they cast the supervision of the office upon the Judges of the Chancery Division.

Draft rule 43 provides for the filing of all Masters' reports in the offices of the Registrars of the Queen's Bench and Common Pleas Divisions and the Clerk of Records and Writs, according to the division in which the action is pending. Heretofore, many such reports have been filed in the offices of local masters.

While the matter of filing Masters' reports is up for consideration, a cognate question of more gravity might profitably be considered. A good deal of doubt and uncertainty prevails as to references to official referees and the mode of appealing from their reports. In *Cumming* v. *Low*, 2 Ont. R. 409, a reference was had to the master at Picton; and the question arose whether it was a reference under the Common Law Procedure Act, or a reference under one of the sections 47 or 48 of the Judicature Act. In the former case, section 191, s-s. 32, of the Common Law Procedure Act, provides for the report of the referee becoming absolute by filing in the same manner as a master's report; and the practice on appeals therefrom is, by section 192, made the same as the practice in appeals from "a Master in Chancery." In the case of a reference under section 47 or section 48 of the Judicature Act, the practice is pointed out in *Cumming* v. *Low*.

As the desire at present is to make uniform the practice in all the divisions, it would be well to assimilate the

practice with respect to all references. No provision is made in the Judicature Act for filing the reports and certificates of referees, though it is most desirable that they should be on the files before being dealt with by the Court. On the other hand a Master's report must be filed before it can be appealed from or acted upon in any way: *Hayes* v. *Hayes*, 8 P. R. 546; *Langtry* v. *Dumoulin*, 10 P. R. 444. The report of a referee under the Judicature Act is, by section 49, equivalent to the verdict of a jury. This necessitates a motion for judgment in order to enforce it, whereas a party is entitled to the process of the Court to enforce a Master's report. Unless further directions are reserved no application to the Court is necessary. If all references, and the modes of enforcing reports and appealing from them were placed upon the same basis, such confusion as that which arose in *Cumming* v. *Low* would not be heard of.

Draft Rule 45 is as follows:—"All motions for judgment under rules 211, 322 and 324, shall be made in Court." All motions for judgment under rule 211, have always been made in Court. With respect to rule 322, the neatest way to accomplish the draftsman's purpose is to strike out from the existing rules the words "or a Judge." All motions under rule 324, both in its original and amended forms, have always been made in Court, though the leave to move may be granted in chambers: *Morrison* v. *Taylor*, 2 C. L. T. 101.

An opportunity is now presented of shortening the time of setting down causes for judgment. In all undefended cases there is no reason why the plaintiff should be compelled to set down his cause seven clear days before the paper day. Any motion not requiring setting down may be made on two days' notice, although seven days' notice would enable the opponent that time for preparation which the present practice does not always give him; and it seems an anomalous thing that an undefended motion for judgment should be delayed, as it is by the present practice. If the last day for delivering a defence falls on a Tuesday, and no defence is delivered, the plaintiff cannot move for

judgment in default of defence for fifteen days, the practice requiring him to set the cause down seven clear days before a Wednesday.

Still another matter respecting motions for judgments is required to be dealt with before the practice can be said to be commonly convenient. In an action in which it will, from its nature, be necessary to move for judgment, if no defence has been delivered, the plaintiff is always subject to have his motion defeated by the defendant's slipping in a defence before judgment is actually pronounced. The only penalty is payment of costs of the motion: *Snider* v. *Snider*, *ante*, p. 325. This is a most effectual way of throwing the plainliff over a sittings, if there is one close at hand; for he is caught unawares. Some provision in the nature of a note *pro confesso* should be made, so as to throw on a defaulting defendant the burden of a substantive application for leave to defend.

A proposal is made by draft rules 49 to 52, to have all judgments entered in a book, the stamps being affixed to the margin of the page upon which the judgment is entered and the entry in the book to constitute the original record. An office copy is to be delivered to the party entitled. If the amendment is to be adopted the draft rules will have to express more clearly what is meant by "entering" the judgment. By rule 49, a memorandum is to be written at the foot of the "judgment," (meaning the copy to be delivered to the Entering Clerk), which "shall be signed by the officer in whose office such judgment is entered." Does this mean the Registrar of the Division, the Entering Clerk, or the Judgment Clerk who settles the form of the judgment in special cases? If the entry in the book is to be the original record, the judgment is not entered until it is so transcribed. The Entering Clerk is "the officer in whose office the judgment is entered." Is the judgment to be signed by him? The "original record" requires only his initials; why should the minutes or copy be signed?

Rule 56 provides for settling diversities in practice. Where the Registrars and Inspector of Legal Offices cannot

agree the President of the High Court is to settle the practice. If this rule comes into force at present the Common Law side will have the preference. *The raison d'être* of this rule is not clear if draft Rule 70 is to be passed which provides that the practice in the Chancery Division is to obtain.

It is suggested by draft Rules 67 and 68 to subject parties, witnesses, and deponents on affidavits to examination and cross-examination in the cause, and on motions pending upon subpœna and appointment. There is a great waste of words in the proposed rules which is sure to give rise to doubts as to their construction.

Rule 71 proposes a radical change in bringing actions to trial. It provides that any action which is not to be tried by a jury may be entered for trial either at the assizes or the Chancery Division sittings. Some delightful confusion will ensue if this rule be passed as it stands. By rule 255 either party may after the close of the pleadings give notice of trial. If the defendant gives notice of trial for the sittings (as he might do to avoid the assizes if the latter were to be held first), would the plaintiff be deprived of his right to give notice of trial for the assizes? By rule 261, "after notice of trial is given either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry." May the plaintiff enter the action as he pleases at the assizes or sittings after notice of trial for either, and have the case tried "in the order of the plaintiff's entry?" Again, the action may by the new rule be entered for trial at the Chancery Sittings "appointed for the place named for the trial of the action, *or nearest thereto*." If the place of trial is an assize town at which no Chancery Sittings are held, can a defendant living in a county where Chancery Sittings are held get a change of venue by giving notice of trial for his Chancery Sittings, and entering the action for trial thereat, if they take place before the Assizes in the plaintiff's county? The anomaly is that there should be separate sittings for the Chancery Division, as we have before pointed out; ante p. 305.

It is suggested by draft rule 79 that on every writ of execution there shall be endorsed the amount of costs to which the party issuing the writ is entitled for the writ and renewals, and the endorsement is to be signed by the officer issuing the writ. No sum not so endorsed is to be collected for such costs.

Draft Rule 80 will revive old issues in its present form. The plaintiff is to name as the place of trial "the county town of the county in which the cause of action arose, or in which the defendant or any one of several defendants resides or carries on business at the time the action is brought." We think we may safely say that the profession would regard the rule with horror, notwithstanding that the place of trial may be changed if the action "can be more fitly, conveniently, and inexpensively tried in some other county town."

The Law Stamp Tax.

An act was passed at the last session of the New Brunswick Legislature, (48 Vict. cap. 1, N. B.), which is apparently designed to elude the blow dealt at provincial revenue by the decision in *Attorney-General of Quebec* v. *Reed*, L. R. 10 App. Ca. 141. In that case the Judicial Committee held that a Provincial Legislature cannot raise money by imposing a duty on legal proceedings payable by means of Law Stamps, because such a tax is indirect. It was argued on the appeal that as the provinces had to maintain provincial courts they should have power to create a special fund for that purpose, and that they should not be limited to direct taxation in order to raise it. "That," said Lord Selborne, "may be an important question which will be considered in any case in which it may arise, but it does not arise in this case." This—the usual policy of the committee — invites another expensive proceeding to try the very same point again under another form of words. Now, they decide that an act directing the imposition of taxes by means of stamps is unlawful; but in a future case they may decide that it is lawful. The New Brunswick

Legislature has accepted the invitation, as far as it can, by passing the act in question, which declares that a special fund shall be formed out of the proceeds of sale of Law Stamps. This fund "shall be applied to the maintenance of the administration of justice in the courts" of the Province. It is true that Lord Selborne says in the course of his judgment that the tax "cannot be justified under the 14th sub-section" of the British North America Act, that relating to the administration of justice, etc.; but by the words before quoted his lordship has expressly left open the point which the act in question raises.

It would seem, on principle, a strange thing if the powers of the provinces in "the raising of a revenue for provincial purposes" were limited to direct taxation, while, for all specific matters of provincial jurisdiction, they should have the power to levy indirect taxes. The administration of justice and the maintenance of the courts are "provincial purposes." In order to show that an indirect tax may be levied for these objects it must be shown, first of all, that they are not "provincial purposes," then, that they require a fund for maintenance, and lastly, that the provinces, without any special grant, have unlimited powers of taxation. According to this line of argument, special funds may be raised by indirect taxation for the "payment of provincial officers" (sec. 92, s-s. 4), the "maintenance and management of prisons" (s-s. 6), the "maintenance and management of hospitals, etc. (s-s. 7), and so on, and after all this, direct taxation may be resorted to for "provincial purposes."

In construing all other sub-sections of section 92, they have been uniformly regarded as specific grants of power to do certain things, without which the legislatures would have had no power to deal with the matters mentioned. It is fallacious, then, to pick out one sub-section and argue that its words are not to be construed as a grant of a specific power, but rather as a limitation of an implied pre-existing power.

Postponements for Counsel's Convenience.

If a layman were told that the Court of Appeal had adjourned because the gentlemen who held briefs in that Court wanted to go off on circuit, he would probably ask with surprise if there were not enough lawyers to keep the Courts busy. And if he attempted to verify his own estimate of the number by standing near the gates of Osgoode Hall and watching the bearers of red bags, and the bearers of blue bags, and the bearers of black bags going in and out, he would express himself in strong terms to any one who suggested that there were not quite enough lawyers.

We thought that in all probability this was the only country in which the convenience of a few of the profession was put before that of the public; but it appears to have become a public question in New York. Mr. Field (who, if we may believe a writer in the *Albany Law Journal*, 19th September, 1885, has had many a case postponed because he was engaged elsewhere) suggests as one of the remedies for the many delays of the law that the trial of a case should not be postponed for this cause. Most people will agree with him. A suitor must employ counsel to argue his case: but he has no right to any particular counsel, and *a fortiori* no right to ask any Court to adjourn until the engagements of his favourite advocate permit him to wait on the Court and argue his case. If the suitor has no such right, neither does it belong to his advocate.

The *Albany Law Journal*, 19th September, 1885, says, "After all, why should the course of public business be delayed on account of a lawyer's engagements? This practice has run into a great abuse. In many of our large towns the Courts frequently get almost run out of business because a favourite counsel is engaged elsewhere; and so long as counsel can thus be accommodated just so long will they take all the business they can, without regard to their ability to do it. In our Court of Appeals the engagement of counsel is no ground of postponement, and we have never heard it complained of."

Recent Appointments.

Judge McDougall has been appointed to the County **Judgeship of York** which became vacant by the resignation of **Judge Boyd**, who for twenty-three years performed the **duties, first of** Junior and then of Senior Judge.

Mr. E. Morgan has been appointed to the seat vacated by **Judge McDougall's** promotion.

BOOK REVIEWS.

The law of husband and wife, as established in England and the United States. By DAVID STEWART, of the Baltimore Bar, author of "Marriage and Divorce." San Francisco: Sumner, Whitney & Co. 1885.

This is one of those condensed works of which the publishers have given us a series. The subject is a difficult one to treat in any shape; and perhaps the author's method of treatment, which is the peculiar characteristic of this series, is the best for this subject. Certainly in no other place except a digest can be found such a collection of cases as this book gives us. The writer can personally testify that he has consulted with profit other books of this series, and he has every reason to believe that this one will not fall behind the others in usefulness.

Constitutional questions in the Province of Quebec. By J. PONSONBY SEXTON, B. C. L., Barrister-at-Law of the Province of Quebec, and LOUIS H. PIGNOLET, Barrister-at-Law of the Province of Quebec, and Counsellor-at-Law for the State of New York. Montreal: 1885.

This little pamphlet contains a short sketch of the struggles of the Province of Quebec through the Courts in its successive endeavours to defend its methods of raising a revenue. No Province of the Dominion has raised so many constitutional questions as Quebec, and there is therefore plenty to be learned from Her misfortunes.

The learned writers give a fair even-handed account of the questions dealt with, and have placed them before the public in a manner which will enable all to understand them—as far as they may be said to be intelligible.

REVIEW OF EXCHANGES.

Albany Law Journal.—23rd May, 1885.

Rules as to the Privileges of Witnesses, by JOHN D. LAWSON. *Rule.* But the privilege cannot be allowed where the crime has been pardoned, or the witness has been convicted or acquitted of his share in it, or the prosecution is barred by time, or his testimony cannot be used against him in another case, or the witness is the defendant in a criminal case, examined as a witness on his own behalf.

Rule. The answer of a witness to a criminating question is admissible against him in another case if given voluntarily, but not if involuntarily.

Illustrations of these rules are given, with numerous references to the cases supporting them.

Ibid.—30th May, 1885.

Common Words and Phrases. Decrepit, movable property, merchant, necessaries for the support and maintenance of the family, telegraph, telephone, shop, are defined.

Delivery not always Essential to a Gift, by GUY C. H. CORLISS. Concluded in the following number. At common law, to constitute a valid gift of personalty, delivery was requisite; but in numerous cases Courts have supported, as declarations of trust, transactions clearly insufficient to constitute a legal gift. The learned writer treats this class of trusts very fully. The cases show that there must be a well defined *intention to create a trust.* If the intention is merely to effect a gift, and this is imperfectly carried out, the Courts cannot cure the defect. Further, the act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention. It is not necessary that the donor should part with the possession of the property; he may retain control of it and yet create a valid trust, but the control retained must not be that of an absolute owner. A parol declaration of the trust will suffice in cases of chattels. No particular form of words is necessary, but the intention must be clearly apparent. The beneficiary need not have notice. A large number of cases are cited.

Ibid.—6th June, 1885.

Delivery not always Essential to a Gift, by GUY C. H. CORLISS. Concluded. Cases where bank deposits are sought to be affected by a trust in favour of a third party are considered, as well as of gifts between husband and wife.

Ibid.—*20th June*, 1885.

The Law's Delays, by JUDEX: A temperate criticism of Judge Learned's article in the last *North American Review* upon "The Tardiness of Justice." The severe arraignment of the judiciary in that article is deprecated, and the attack answered by explanations of the many difficult tasks imposed upon the machinery of justice, requiring a reasonable expenditure of time for their proper and satisfactory completion. The learned writer suggests an increase in the number of appellate judges and a stricter limitation of the right of appeal as rational means of speeding the progress of litigation.

Ibid.—*27th June*, 1885.

Trial by Jury, as it is and as it should be, by S. STEWART WHITEHOUSE. It is suggested that unanimity should no longer be held necessary, while better material should be secured for the jury box through a more sparing extension of the indulgence of trial judges towards applicants who for private convenience strive to shirk their duty in this field of the public service. All questions of fact in suits in equity should be tried by jury.

Ibid.—*4th July*, 1885.

The Utility of Rules of Evidence, by ED. J. MAXWELL. The learned writer adopts the opinion that the question of economy of time furnishes the only valid reason why the Court and jury should not be permitted to hear everything in the shape of testimony which either of the litigants could present, and be left to determine, from the standpoint of common sense, guided by their judgment as to the character of the witness and all the surrounding circumstances, where the truth actually lay. Adverting to the expense and vexation of rehearings and new trials grounded upon improper reception or rejection of evidence according to existing rules, he proposes as a remedy that in all cases trial judges should have absolute discretion in receiving evidence, and that while the improper *exclusion* of evidence should, as now, form ground for a new trial, the *admission* of evidence should in no case do so. "The time, I doubt not, will come, when issues of fact in Courts of law will be determined by the same rules of common sense which govern in ordinary transactions, by giving a liberal ear to all that can be said, *pro* or *con*, and by weighing the different statements in the balances of a varied experience and an enlightened judgment."

Ibid.—*18th July*, 1885.

Common Words and Phrases. Summer—Manufacturer—Carriage—Corn—Tools—are defined.

The Courts as Railway Managers, by LAWRENCE GODKIN. The salutary rules laid down in *Gardner* v. *London, Chatham and Dover Railway*, 2 L. R. Ch. 201, in limitation of the appointment of receivers to manage insolvent corporations in England have not been generally observed by Courts in the United States. Many evils have there been

found to result from an assumption of jurisdiction which practically thrusts upon the Courts the management of railways, and with these the article deals. Suggestions are made of reform in the existing law upon the subject.

Irish Law Times.—28th February, 1885.

Scandalous Bills of Costs. Observations upon the case of *re Miller* and *Miller*, reported in the *Law Times*, 21st February, 1885. It was there contended that the jurisdiction of the Court to expunge scandalous or impertinent matter is confined to pleadings and affidavits, and that a bill of costs may defame with impunity. The case in question determines that such bill may not be made the vehicle for conveying slanderous, impertinent or improper statements, and that where such appear in the bill, the Court will, upon motion, order the scandalous matter to be struck out, with costs against the person bringing in the bill. The injured party might also have his action for damages for the libel. Upon the general principle, see *Erskine* v. *Gartshore*, 18 Ves. 114; *Sadlier* v. *Smith*, 7 P. R. 409.

Ibid.—7th March, 1885.

Liability of Company on Forged Share Certificate. It is taken as clear law that a company is liable in respect of a share certificate issued by the secretary within the scope of his authority, notwithstanding that it was fraudulently issued. So a corporation is liable to the owner of stock whose name has been forged to a transfer of the certificate, the corporation officers having, in good faith, cancelled the old certificate and issued a new one to the supposed lawful holder by such forged transfer. The case of *Shaw* v. *Port Philip Gold Mining Co.*, 50 L. J. N. S. 685, is commented upon.

Ibid.—14th March, 1885.

Manslaughter Through Negligence. Cites recent English and American cases.

Ibid.—2nd May, 1885.

Married Woman's Consent to Breach of Trust. In order to charge the separate estate of a married woman for a breach of trust committed at her suggestion or with her approval, it must be shown that she was fully informed of the state of the case and really acted for herself. The onus of establishing this lies upon the trustees, who may otherwise be held strictly liable to her. The gainer by a breach of trust must pro tanto indemnify the trustees, and persons at whose instance the trustees have committed the breach may be held liable to recoup the subject of that breach to the trustees. The recent case of *Sawyer* v. *Sawyer*, before the English Court of Appeal, and earlier decisions, are considered.

Ibid.—9th May, 1885.

Liability of Solicitor for Partner's Misappropriation of Securities. "The general principle applicable to cases of the kind has

been clearly and correctly enunciated by *Hardman* v. *Johnson*, 2 E. & B. 61, viz., that the receipt of money from a client by one of a firm of solicitors professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of a solicitor, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited, such a transaction being part of the business of a scrivener, and solicitors, as such, not necessarily being scriveners; but if money be so deposited with one partner for the purpose of being invested on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of a solicitor."

Ibid.—16*th May*, 1885.

Wilful Misconduct of Railway Companies. Upon a contract for the shipment of goods limiting the ordinary liability of the company to damages caused by wilful misconduct on the part of the company's servants, the onus of proof of such misconduct rests upon the plaintiff. A by-law that a company will not be responsible for any delay, however great, has been held a reasonable by-law. *Hoare* v. *G. W. Rwy. Co.*, 37 L. T. N. S. 186; *Woodgate* v. *G. W. Rwy. Co.*, 51 L. T. N. S. 826, and *Stevens* v. *G. W. Rwy. Co.*, reported in the *Law Times* of 2nd May, 1885, are considered.

Ibid.—13*th June*, 1885.

Permitting Trust Fund to Remain in Solicitor's Possession. Trustees who allow trust moneys to remain in the hands of their solicitors, unless there is a sufficient reason for this being done, are responsible to the estate for any loss, retaining control of trust funds being no part of the business of a solicitor. Recent cases are commented upon.

Ibid.— 20*th June*, 1885.

Deposit by Convicted Person to Secure Surety for Good Behaviour. Such deposit cannot be recovered back if the contract is carried out, inasmuch as a contract to indemnify bail is against public policy and void.

Ibid.—18*th July*, 1885.

Fresh Injury Arising from Original Tort. The effect of the Statute of Limitations in such cases is considered, and *Mitchell* v. *Darley Main Colliery Co.*, reported in the *Law Times*, 11th July, 1885, and other cases referred to.

Ibid.—8*th August*, 1885.

Acceptance of Goods Within the Statute of Frauds. A consideration of recent cases under the seventeenth section of the statute.

Law Journal.—9*th May*, 1885.

Evidence making Private Business Firm Business. Remarks upon the case of *Cleather* v. *Twisden*, 54 L. J. Rep. Ch. 408, which deals

with the liability of a solicitor for the fraudulent misappropriation of securities by his partner.

Ibid.—23*rd May*, 1885.

The Equitable Doctrine of Ademption. *Pollock* v. *Worrall*, 54 L. J. Rep. Ch. 489, is criticised, and the remarks of the Master of the Rolls in that case to the effect that, while giving his decision in accordance with the result called for by the application of the doctrine of equitable ademption he was unable to approve of that doctrine, are quoted with approval. "It is altogether too late to enter upon the question how the equitable doctrine of ademption fits in with the general law. It is, at all events, an infringement of the policy that to have one document as the conclusive test of a testator's meaning best does justice in the long run, and leads less to litigation."

Ibid.—13*th June*, 1885.

Implied Contracts to Indemnify. It is held in *Edmunds* v. *Wallingford*, 54 L. J. Rep. Q. B. 305, that as a general rule where goods are lawfully seized for the debt of one who is not their owner, the owner is by an implied contract entitled to redeem them and to be reimbursed what he has paid from the debtor. This case apparently overrules *England* v. *Marsden*, 35 L. J. Rep. C. P. 259. As examples in illustration of the doctrine are mentioned the case of a surety paying the debt of his principal, a joint debtor paying the whole debt, and where the joint property of a firm is seized for the debt of an individual member.

Ibid.—20*th June*, 1885.

Responsibility for a Negligent Servant. Numerous conflicting cases upon the subject are considered, and a test suggested to determine the responsibility.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

COMMON PLEAS DIVISION.

[The Divisional Court, 5th September, 1885.

BULL v. NORTH BRITISH LOAN CO.

Order made at trial—Judge in Chambers—Res judicata—Jurisdiction of Divisional Court.

At the trial of the action at the Toronto Assizes, Armour, J., endorsed the following upon the record:—"Upon my own motion I order that the place of trial in this cause be changed to the Town of Belleville, and that this cause be tried at the next Assizes there by a jury." Rose, J., sitting in Chambers, had previously refused to change the place of trial from Toronto to Belleville.

Held, that the question of the place of trial was *res judicata* by the judgment of Rose, J.

Held, also, notwithstanding sec. 28, sub-secs. 2 and 3, of the Judicature Act, that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., because of the language of Rule 254, and of the order appealed from.

Semble, that Rule 254 does not give a judge a right to interfere with the procedure in the action except at the instance of a party.

Wallace Nesbitt and *Urquhart*, for the appeal.

C. Millar, contra.

McLEAN v. SHIELD.

Foreign judgment—Non-resident—No notice of process—Application to set aside judgment—Effect of.

In an action on a foreign judgment recovered in the Court of Queen's Bench, Manitoba, against S. & L., the defendant S. pleaded that he was not at or during the time during which the proceedings were being taken to recover the judgment, nor has he since been a resident of or domiciled within the Province of Manitoba, and he was not served with any process or notice of the said action, nor had he any notice whatever of any proceedings in said action, nor had he any opportunity of appearing in the said action and defending the same; and the said judgment was obtained in his absence and without his knowledge.

Held, following *Scheslig* v. *Westenhaltz*, L. R. 6 Q. B. 155, a good defence.

S. on hearing of the judgment moved to set it aside, but the application was refused on the ground that it was made too late.

Held, that this did not preclude him from disputing his liability on the judgment.

Watson, for the plaintiff.

Tilt, Q.C., for the defendant.

CARSON v. VEITCH.

Assessment Act—Right of tenant to deduct taxes from rent—Demand of taxes—Assessment, sufficiency of—Failure to distrain for taxes—Right to collect.

By section 91 of the Assessment Act, R. S. O. cap. 180, "Any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant," unless there is an agreement to the contrary. By section 12, the assessment roll must contain amongst other things, "Column 8—Number of concession, name of street, or other designation of the local division in which the real property lies. Column 9—Number of lot, house, &c., in such division. Column 10—Number of acres or other measure showing the extent of the property." In this case the name of the street and the measure of the

property were given, but not the number of the lot, &c., except an arbitrary number adopted by the assessment department for their convenience; and it appeared that a person would be unable by looking at the roll without making enquiries to discover the property. Prior to the defendant's entry B. was assessed as owner and had received for the three prior years a notice of assessment or assessment slip, similar in form to the assessment slip in this case. The only demand for the taxes was the leaving of the slip. In an action for illegal distress for rent, the plaintiff claiming that no rent was due by reason of his having paid the taxes,

Held, that section 21 does not authorize the occupant to voluntarily pay the taxes, but that he can only deduct same when they can be recovered from him and also from the owner; and as under *Chamberlain* v. *Turner*, 31 C. P. 460, there was no legal demand as required by section 92, upon which a distress for taxes could have been founded there was no legal liability to pay the taxes, and therefore no claim to deduct them from the rent.

Quære, as to the sufficiency of the assessment.

Quære, also, whether, when there is a sufficient distress upon the property, and the municipality by its own laches puts it out of its power to distrain, section 100 applies so as to give the right to collect by action.

J. Reeve for the plaintiff.

Bigelow, for the defendant.

[WILSON, C. J., 22ND SEPTEMBER, 1885.

FOX v. SYMINGTON.

Interpleader—48 Vict. cap. 14, sec. 6, s-s. 3—Protection of bailiff.

The Act 48 Vict. cap. 14, sec. 6, s-s. 3, provides that the Judge of the Division Court in interpleader proceedings shall adjudicate between the parties or either of them and the officer or bailiff in respect of any damage or claim of or to damage arising or capable of arising out of the execution of the process of such officer or bailiff, and make such order in respect thereof, &c., as to him shall seem meet.

Held, that this is for the protection of the officer or bailiff only.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 3RD SEPTEMBER, 1885.

MORTON v. HAMILTON PROVIDENT & LOAN SOCIETY.

Mortgage—Sale under power—Surplus—Account—Scale of costs—Rule 515.

The order of Proudfoot, J., 10 P. R. 636, ante. p. 228, was affirmed.

Muir, for the appeal.

Watson, contra.

MASSE v. MASSE.

Action in Chancery Division—Jury notice—Transferring action—Rule 545.

The order of Boyd, C., 10 P. R. 145, ante. p. 233, was reversed, following *Pawson* v. *The Merchants' Bank*, ante. p. 279.

W. H. P. Clement, for the appeal.

J. C. Hamilton, contra.

[11TH SEPTEMBER, 1885.

HICKEY v. STOVER.

Delay in settling judgment—Leave to appeal.

Leave given to appeal though by delay in settling the judgment the time for appealing had expired.

Judgment was pronounced by Ferguson, J., at the trial upon the 19th of June, 1885, but the judgment was not settled and passed until after the long vacation. The sittings of the Chancery Divisional Court began on the 3rd September, 1885. Rule 522 requires an appeal to the Chancery Divisional Court to be set down seven days before the sittings; and Rule 523 requires every application to the Divisional Court to change or reverse any judgment to be made at the first sittings of the Divisional Court which begins not less than ten days after the pronouncing of the judgment. No cause can be set down to be heard before the Chancery Divisional Court until the judgment or order appealed from has been drawn up and settled. By reason of the delay in settling the judgment the case could not be set down for the Divisional Court.

Maclennan, Q.C., for the defendant, moved for leave to set the action down to be heard by way of appeal from the judgment of Ferguson, J., (the judgment having this day been drawn up and settled), notwithstanding the lapse of time. He cited *O'Sullivan* v. *Harty*, 5 C. L. T. 275.

Matthew Wilson, for the plaintiff, cited *Rumohr* v. *Marx*, 3 C. L. T. 51; *Shupe* v. *Shupe*, 4 C. L. T. 129; *Re Pilcher*, 11 Ch. D. 905; *Re New Callao*, 22 Ch. D. 484; *Re Manchester Economic Building Society*, 24 Ch. D. 488; *Whistler* v. *Hancock*, 3 Q. B. D. 83; *King* v. *Davenport*, 4 Q. B. D. 402; *Collins* v. *Paddington*, 5 Q. B. D. 368.

The Court was of opinion that *O'Sullivan* v. *Harty* did not apply, as the language of the Supreme Court Act was different; that the time for appealing under Rule 523 ran from the 19th of June, the day judgment was pronounced, and that the neglect to draw up the judgment, which made it impossible to set the cause down, did not extend the time for appealing. There was, however, a *bonâ fide* intention to appeal; instructions had been given; the client lived abroad in Texas; the judgment pronounced was of some complexity, and there were only twelve days before vacation during which it could have been settled otherwise than by consent; and the same diligence could not be expected or required in vacation as at other times. The leave was granted on payment of the costs of the application.

[FERGUSON, J., 8TH JUNE, 1885.

SMART v. SORENSON.

Dower Act of 1879—Dower in Equity of Redemption—Husband aliening.

On 21st February, 1884, the plaintiff recovered a judgment against C. S. in an action of *Sorenson* v. *Smart*, 5 Ont. R. 678, for his costs, and the same were taxed at $315. On 20th March, 1884, he placed writs in the sheriff's hands to levy that amount, but nothing could be made thereon. At the date of the judgment, C. S. owned certain lands, subject to a mortgage dated 2nd December, 1881, to one J. A., in which M. S., the wife of C. S. joined and barred her dower. On 26th February, 1884, five days after the above judgment, the lands were sold and conveyed to C. for $2,250, and M. S. joined and barred her dower. C. and C. S. went to the sheriff and paid off some *fi. fas.* leaving a balance of $350 due C. S. on the sale of the lands, which C. was to secure by mortgage. On 14th March, 1884, C. executed the mortgage, which was made to M. S. as mortgagee. The plaintiff now brought this action against C. S., M. S., and C., and claiming that M. S. held the mortgage merely as trustee for her husband, and the defendants alleging that M. S. had dower in the lands, and had refused to join in the deed to C. without getting the mortgage in her name, and thus had given value therefor.

Held, that *Fleury* v. *Pringle*, 26 Gr. 68, and *Black* v. *Fountain*, 23 Gr. 174, are still law, and a wife only has dower in an equity of redemption where the husband dies seised, and the latter may defeat her right by alienation; and the Dower Act of 1879 does not affect the case of the husband not dying seised of the equity of redemption; and that therefore M. S. gave no valuable consideration for having the mortgage made to her, and must be declared trustee for her husband.

A. O. Jeffery, for the plaintiff.

[8TH SEPTEMBER, 1885.

HILL v. THE NORTHERN PACIFIC JUNCTION R. W. CO.

Single judge—Power to review findings of Referee—Judicature Act, sections 48 and 50.

Held, notwithstanding the language of section 50 of the Judicature Act, a single judge, sitting as the Court, has power to review the findings of an official referee upon a reference under section 48 of the Act.

Boulton, Q.C., for the defendants.

J. C. Hamilton, for the plaintiff.

[14TH SEPTEMBER, 1885.

ROSS v. CARSCALLEN.

Setting aside judgment—Trial judge in court at Toronto—Rule 270.

When the action came on for trial at Chatham, the plaintiff, together with his counsel and witnesses, was absent, and the judge presiding at the trial pronounced judgment for the defendant.

Held, that the same judge had power under Rule 270, when sitting afterwards as the Court at Toronto, to set aside the judgment given at the trial.

Hillard v. *Arthur*, 10 P. R. 281, distinguished.

Raymond, for the plaintiff.

Moss, Q.C., for the defendant.

IN CHAMBERS.

[FERGUSON, J., 19TH SEPTEMBER, 1885.

In re LEWIS; JACKSON v. SCOTT.

Disputed will—Trial by jury—Heir-at-law—Exclusive jurisdiction of Chancery—Character of issues.

The heir-at-law, in an action where he disputes the will, has not now an absolute right to a trial by jury in this Province.

An action to establish a will removed from a Surrogate Court to the Chancery Division, is one over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction, and a motion to the Court to have the issues in such an action tried by a jury is included in the "practice" mentioned in section 45 of the Judicature Act.

Issues raised on the following pleas, viz.: that the will was not executed in due form, that the testator was not of sound mind, undue influence, fraud, that the testator was labouring under certain delusions, were

Held, not of such a character that they should be sent to be tried by a jury.

W. H. P. Clement, for the defendant.

Holman, for the plaintiff.

[21st September, 1885.

In re ROGERS; ROGERS v. ROGERS.

Master's Office—Jurisdiction—Reference under order of Master in Chambers—Disputed lease—Fraud—Trial of issue—Rule 256—Who should be plaintiff.

Held, that on a reference for partition or sale of lands directed by the Master in Chambers, the Master in Ordinary, had no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs at law, who claimed that the lands should be sold subject to his lease, some of the other heirs at law disputing the validity of the lease, and alleging that it was either a five years' lease or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face.

The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in Chambers under Rule 256, to be tried at the next sittings for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue.

Shepley, for the plaintiffs and the lessee.

J. Hoskin, Q.C., for the infant defendants.

E. B. Brown, for the defendants who disputed the lease.

[Rose, J., 19th June, 1885.

HAY v. PATERSON,

Ca. sa.—Execution—R. S. O. cap. 69.

A defendant arrested and imprisoned under a *ca. sa.*, is a debtor in close custody within the meaning of R. S. O. cap. 69.

Shepley, for the plaintiff.

Walter Read, for the defendant.

[O'Connor, J., 28th August, 1885.

NORSWORTHY v. SOCKRIDER.

Foreign Commission—Viva voce examination—Rules 289, 300.

The execution creditor, plaintiff in a garnishee issue, applied for an order for the issue of a commission to La Fayette, Oregon, U.S.A., for the examination *vivâ voce* of the execution debtor and his wife, touching the alleged indebtedness of the garnishee. It was shewn that the indebtedness, if any, had been incurred under suspicious circumstances, and *primâ facie* with the view of defeating the creditors of the debtor, and that a searching examination would be necessary. The garnishee objected to an oral examination being directed.

Held, that an order should be made for the examination of the witnesses on written interrogatories and also *viva voce*; that the words "upon the subject matter of such interrogatories as arising out of the answers thereto" in Rule 289 cover a general oral examination; and that, under Rule 300, an order may be made, if necessary, for an examination, wholly *vivâ voce*, even if all parties do not consent; following *Hateley* v. *Merchants' Despatch Co.*, before Armour, J., 11th April, 1882, (unreported).

Aylesworth, for the motion.

R. S. Cassels, contra.

LIGHTBOUND v. BOWER.

Partnership out of Jurisdiction—Service effected on member of firm within jurisdiction—Cause of action—Rule 45.

The defendants were a copartnership having their place of business in Brandon, Manitoba. The plaintiffs were a copartnership having their place of business in Montreal, Quebec, and sued on certain promissory notes made by the defendant firm in Brandon, and payable to the order of the plaintiff firm in Montreal. The writ was served in Ontario on three of the defendants who resided there. M., one of the defendant firm, moved to set aside the writ and service. It appeared that several of the defendants had individually assets in Ontario.

Held, that under Rule 40, the service was good, and that the service being properly effected, the question of cause of action could not be considered. That is only necessary where an application is made under Rule 45, for the allowance of service effected out of the jurisdiction.

Held, also that if it were the case of an application to allow service, the fact of the members of the firm having individually assets in Ontario would give the court jurisdiction in view of the provisions of Rule 346.

R. S. Cassels, for the motion.

Douglas Armour, contra.

[14TH SEPTEMBER, 1885.

SCOTT v. WYE.

Married Woman—Judgment—47 Vict. cap. 19 (O.).

Held, that the "Married Women's Property Act, 1884," 47 Vict. cap. 19 (O.), is not retrospective.

A motion under Rule 80, for judgment upon a promissory note against a married woman was dismissed in April, 1883, and was now renewed, 14 months after the passing of the Act of 1884.

Held, that that Act made no change in the law which could assist the plaintiff, even if the matter were *res integra*.

Turnbull v. *Forman*, 15 Q. B. D. 234, followed.

W. H. P. Clement, for the motion.

J. F. Smith, contra.

[THE MASTER IN CHAMBERS, 9TH SEPTEMBER, 1885.

LONDON & CANADIAN L. & A. CO. v. MURPHY.

Action in High Court—Interpleader issue sent to County Court—Order postponing trial, where made—44 Vict. cap. 7, sec. 1 (O.).

Where an order made in an action in the High Court of Justice directs the trial of an interpleader issue in a County Court, all proceedings from the completion of the order sending the issue to the County Court, until final judgment must, by the provisions of 44 Vict. cap. 7, sec. 1 (O.), be taken in the County Court.

A motion made in Chambers in the High Court of Justice to postpone the trial of an issue so directed was refused without costs.

G. W. Meyer for the motion.

Bristol (*Howland, Arnoldi, & Ryerson*), contra.

[11TH SEPTEMBER, 1885.

RADMORE v. ELLIOTT.

Money paid into Court by defendant—Retaining money in Court—Rules 215 and 217.

The defendant paid money into Court in part satisfaction of the plaintiff's claim, under rule 215, but also disputed part of the plaintiff's claim. The defendant then applied under the words in Rule 217, "unless otherwise ordered by a judge" to have the money so paid in retained in Court to abide the event of the action, alleging that if he succeeded in his defence, he could not recover costs from the plaintiff who was, he alleged, insolvent.

Held, that this would be, in effect, ordering security for costs, and the motion was refused.

Shepley, for the motion.

Haverson, contra.

In the Maritime Court.

(Reported by R. Gregory Cox, Esquire, Barrister-at-Law.)

THE CARGO EX DRAKE.

Jurisdiction of Maritime Court—No maritime lien for freight or demurrage.

There is no maritime lien for freight or demurrage.

The petition in this case was filed on 4th January, 1883, and set forth the following facts:—

On the 11th day of November, 1882, the plaintiffs, vessel-owners of Buffalo, N. Y., entered into a contract with Pugh & Co., of Port Arthur, Ontario, to carry in their barge, the *Drake*, from Buffalo to Port Arthur, a cargo of coal at a certain rate per ton. By the bill of lading it was provided that the consignees should have four full fair working days to unload, and should pay $100 a day for detention of vessel thereafter. The vessel arrived with the cargo at Port Arthur in due course on 30th November, 1882. The consignees unloaded the coal and placed it in a public warehouse on the dock. They did not complete the unloading until the expiration of five days beyond the time allowed by the contract. The consignees refused to pay the freight and demurrage for the said five days, and the plaintiffs refused to allow them to remove the coal.

On 1st March, 1883, an answer was filed on behalf of the consignees, submitting that this Court had no jurisdiction to try this action, and claiming the same benefit of this objection as if they had demurred to the petition.

On 18th May, 1883, a demurrer was filed by consent, and the question of jurisdiction argued before E. J. Senkler, Esq., Surrogate Judge at St. Catharines.

W. H. McClive, for the demurrer.

R. Gregory Cox, contra.

The following authorities were cited on the argument:—*Cargo ex Argos*, L. R. 5. C. P. 134; 4 A. & E. 13; *Mors Le Blanche* v. *Wilson*, L. R. 8 C. P. 227; *Cargo ex Erie Stewart*, 19 Can. L. J. 11; *The Annie M. Allen*, 3 C. L. T. 108; *Foard* on Merchant Shipping, pp. 399-400; 25-26 Vict. cap. 63 (Imp.).

SENKLER, Sur. J.—Held that there is no Maritime Lien for freight or damage, and that this Court had no jurisdiction to entertain this suit. No costs.

THE WALTER S. FROST.

Jurisdiction—Damage to land—Proximate cause.

The propeller *Walter S. Frost*, while passing through the Welland Canal, owing to the fault of her owners broke the head-gates of a Lock, in consequence of which the water rushed from the upper level into the level below the Lock and thence over the canal bank and flooded the plaintiff's farm which lay adjacent to the canal, doing serious injury.

Held, that this court had jurisdiction to entertain an action to recover damages for such injury, and that it was the natural and proximate consequence of the fault of the ship, and that she was liable.

The jurisdiction of the court to entertain a suit for injuries to a person by collision, discussed.

This was a cause of damage instituted on behalf of the owner of a farm adjacent to the Welland Canal, against the propeller *Walter S. Frost*, and her owners intervening. The Petition alleged that in October 1883, the *Walter S. Frost* was proceeding from Lake Ontario to Lake Erie through the Welland Canal, and that when entering lock No. 5, owing to the negligence and carelessness of her master and crew, she was allowed to run against the head-gates of the said lock with great force, and thereby broke and carried away the same, in consequence of which the water in said canal above said lock, rushed down with great force and overflowed the bank of the canal, and rushed in a torrent over the plaintiff's farm, adjacent to the canal, destroying the crops, and carrying away the soil, and thereby the plaintiff lost her crops and other property, and her farm was greatly injured and impaired in value.

An answer was filed on behalf of the owners, alleging among other things, that there was no legal liability upon them to pay the plaintiffs claim (*a*).

The question of jurisdiction was not raised. Afterwards it was arranged between the proctors for all parties that the question of jurisdiction and of the defendants' liability, should be first argued and disposed of as upon a demurrer to the petition.

On 29th October, 1884, these points were argued before E. J. Senkler, Esq., Sur. J., at St. Catharines.

J. C. Rykert, Q.C., for the demurrer.

This suit is to recover damages for injury to real estate. The Admiralty Court has no jurisdiction except perhaps in cases which arise under the Imperial Act, 10 Vict. cap. 27, sec. 74, known as "The Harbours, Docks and Piers Act, 1847," which Act does not extend to Ontario, and in any case does not cover such a claim as this. The American authorities are clear that there is no jurisdiction.

R. Gregory Cox, contra.

The Vice-Admiralty Courts Act, 1863, (24 Vict. cap. 24), give Vice-Admiralty Courts jurisdiction over "claims for damage done by any ship." This expression includes every possible kind of damage. The *Beta* (*b*); *Monaghan* v. *Horn* (*c*).

The Vice-Admiralty Court at Halifax has held that under this statute, a suit for damage done by a ship to a wharf could be maintained in a Vice-Admiralty Court. The *Chase* (*d*); see also the *Sylph* (*e*); the *Uhla* (*f*);

(*a*) See as to the sufficiency of the answer, ante, p. 425.
(*b*) L. R. 2 P. C. 447.
(*c*) 7 S. C. R. 409.
(*d*) 2 Stu. V.-Ad. 361.
(*e*) L. R. 2 A. & E. 24.
(*f*) L. R. 2 A. & E. 29, note (1).

the *Clara Killam* (*g*); the *Industrie* (*h*); the *Sisters* (*i*); and as to remoteness of damage *Trinity House* v. *Romney Marsh* (*j*); the *George & Richard* (*k*).

SENKLER, Sur. J., 8th April, 1885.—The Maritime Court of Ontario is constituted by the Dominion Act, 40 Vict. cap. 21; and by section 1 of that statute it is enacted that, "Save as by this Act is excepted, all persons shall, after this Act comes into force, have, in the Province of Ontario, the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce on any river, lake, canal or inland water, of which the whole or part is in the Province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the powers of such Court extended to the said Province."

The jurisdiction of British Vice-Admiralty Courts is defined by the Imperial Act 26 Vict. cap. 24, sec. 10 & 12, and among the matters in respect of which jurisdiction is given by section 10 is "(6) Claims for damage done by any ship." This Act is known as the Vice-Admiralty Courts Act, 1868.

By the Imperial Act 24 Vict. cap. 10 (the Admiralty Court Act 1861) section 7, it is enacted that the High Court of Admiralty shall have jurisdiction over "any claim for damage done by any ship."

These words are almost precisely the same as those in the Vice-Admiralty Courts Act 1863 just quoted, the only difference being that the words "any claim" are used instead of the word "claims;" and in the case of *Monaghan* v. *Horn* (*l*), the Supreme Court of Canada held that whatever jurisdiction the High Court of Admiralty has over "any claim for damage done by any ship," the Vice-Admiralty Courts in the British possessions have jurisdiction to entertain and adjudicate upon a like claim, and this Court has, within the limit defined by the Act creating it, the same jurisdiction.

It will be necessary therefore to consider what jurisdiction has been conferred upon the High Court of Admiralty by section 7 of the Admiralty Court Act 1861.

This section has been considered by the High Court of Admiralty in England in a number of cases, and also by the Judicial Committee of the Privy Council, and by the Courts of Common Law; and a decided difference of opinion was shewn to exist as to the extent of the jurisdiction conferred by the section, especially with regard to personal injuries received by individuals, and occasioned by the collisions of vessels. In the Court of Admiralty it was held in several cases that an action could be maintained in that Court *in rem* for such injuries, and that such an

(*g*) L. R. 3 A. & E. 161.
(*h*) L. R. 3 A. & E. 303.
(*i*) L. R. 1 P. D. 117.
(*j*) L. R. 5 Ex. 204; 7 Ex. 247.
(*k*) L. R. 3 A. & E. 466.
(*l*) 7 S. C. R. 409.

action could be maintained under Lord Campbell's Act in cases where death had ensued, by the representatives of the deceased, and this view was sustained by the Privy Council in the case of the *Beta* (*m*), in which case Lord Romilly said, in giving judgment, that the words of the 7th section "clearly include every possible kind of damage."

This decision was criticised by the Court of Queen's Bench in the case of *Smith* v. *Brown* (*n*), in which case the Court of Queen's Bench held that the Court of Admiralty has no jurisdiction to entertain a suit instituted under Lord Campbell's Act for personal injuries resulting in death, occasioned by the collision of two vessels; and it prohibited the Court of Admiralty from so doing. The language of Chief Justice Cockburn in this case indicates that he considered that the Court of Admiralty had no jurisdiction in any case of personal injuries, although that point did not necessarily arise for decision.

The first case in which the question as to the jurisdiction under Lord Campbell's Act was mooted was the *Franconia* (*o*), in which Sir Robert Phillimore decided to follow the decision of the Privy Council rather than that of the Queen's Bench, and decided in favour of the jurisdiction; and on the case being taken to the Court of Appeal, that Court was equally divided. Lords Justices Baggally and James sustained the view of Sir Robert Phillimore, and Lords Justices Bramwell and Brett were of the contrary opinion. This question has however been finally settled by the decision of the House of Lords in the *Vera Cruz* (*p*), in which it was held that the Court of Admiralty cannot entertain an action *in rem* for loss of life under Lord Campbell's Act.

The decision, however, proceeds upon the ground that the remedy given by Lord Campbell's Act, being a new and especial proceeding, the creation of that Act, was not affected by the general words of the section under consideration and did not come within them and does not touch the question of how far a suit for personal injuries not resulting in death can be brought in the Court of Admiralty. Lord Blackburn expressly declares this point to remain open.

In the case of *Smith* v. *Brown*, the judgment of Cockburn, C.J., points out that neither in common parlance nor in legal phraseology, is the word "damage" used as applicable to injuries done to the person, but solely as applicable to mischief done to property, and that the legislature in the Merchant Shipping Act, 1854, and the Merchant Shipping Amendment Act (both being Acts *in pari materia* with the one under consideration), had in a series of sections carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss and damage done to ships, goods or other property on the other, and that there was no reason to suppose that the legislature, in using the term in the enactment under consideration,

(*m*) L. R. 2 P. C. 447.
(*n*) L. R. 6 Q. B. 729.
(*o*) L. R. 2 P. D. 163.
(*p*) L. R. 10 App. Cas. 59.

had lost sight of the distinction uniformly observed in the preceding statutes.

This reasoning largely influenced the decision arrived at in that case, viz: that the Court of Admiralty has no jurisdiction under Lord Campbell's Act, but it has a wider and more general application than merely to that class of cases as pointed out by Lord Blackburn in his judgment in the *Vera Cruz*.

The present case is not one of personal injury, and consequently the decisions I have referred to can have no direct bearing upon it. They, however, shew that the wide statement of Lord Romilly in the *Beta*, that the section includes "every possible kind of damage," can hardly be sustained, and that some narrower meaning must be assigned to it.

In the judgment of Cockburn, C.J., in *Smith* v. *Brown*, his view of the effect of this section upon cases of collision is shewn in the following words: "By the statutes of 13 Rich. 2, cap. 5, the jurisdiction of the Admiral was expressly limited to cases arising on the high seas. It was therefore ousted in respect of any damage occurring on any water within the body of a county. By the Act of 3 and 4 Vict. cap. 65, this restriction was indeed removed, jurisdiction being given in respect of all claims and demands whatsoever in the 'nature of damage received by any ship or sea-going vessel whether such ship or vessel may have been within the body of a county or upon the high seas, at the time when the damage was received, in respect of which claim was made.' But the jurisdiction thereby given was confined to ships and sea-going vessels; damage done to a barge or other vessel engaged in inland navigation would not have been within the jurisdiction. Hence Dr. Lushington said in reference to this section 7, 'I take it to mean every case of damage done by any ship; there is no limitation, no restriction expressed" and heard the case, which was one of damages by the Falmouth Dock Company against the *Uhla* for injury done to the breakwater by the vessel driving against it, and the *Uhla* was pronounced to blame for the damages."

This case will be found in a note to the *Sylph* (*q*). It seems also to be reported in 19 L. T. N. S. at p. 579, but I have not seen that report. It is referred to by Cockburn, C.J., in *Smith* v. *Brown*, and he admits that it comes within the express words of the section, as the damage had been done to the breakwater by the ship itself, and does not say anything from which it appears that he disapproved of it.

In the case of the *Industrie* (*r*) it was held that the Court of Admiralty had jurisdiction to entertain a claim against a vessel for being allowed improperly to lie across a channel leading to a harbour without a light, in consequence of which the plaintiff's vessel, which was sailing up the channel, was compelled to go out of the fairway of the channel and took the ground and was driven against the lower wall and was injured and also did damage to the wall. In this case Sir Robert Phillimore, after stating that there had been some fluctuation in the decisions, says: "It

(*q*) L. R. 2 A. & E. at p. 29.
(*r*) L. R. 3 A. & E. 303.

is now established that the court has jurisdiction where damage has been done or received by a ship, although there may not have been any collision between two or more ships," and he held that a petition setting out these facts disclosed a good cause of action.

In neither the *Uhla*, nor the *Industrie*, was the Act 10 Vict. cap. 27, sec. 74, (The Harbours, Docks, and Piers Act, 1847), referred to, but the cases were decided under the section I have just been considering on the general jurisdiction of the Admiralty Court.

The true effect of that Act is given by Lord Cairns in the *River Wear Commissioners* v. *Adamson* (*s*), in which it was decided that under that Act no right was created to recover damages in cases where before the Act there was not a right to recover damages from some one; but that whenever the persons in charge of the ship would have been liable for damage done by the ship to a pier or dock, the owner of the ship should also be liable without regard to the question whether he was in charge of the vessel either personally or by his servant. It is quite possible that a maritime jurisdiction may be created by this section inasmuch as it gives a right to detain the vessel doing the damage until security is given for the damage done; but the case just cited, and *Dennis* v. *Tovell* mentioned in it, were both brought in the Common Law Courts.

In the case of the *Chase* (*t*), decided by the Chief Justice of Nova Scotia, sitting as judge of the Vice-Admiralty Court at Halifax, it was held that the Vice-Admiralty Court had jurisdiction in a case of damage done by a ship to a wharf. The learned Chief Justice reviewed many of the English cases, and arrived at the conclusion that the jurisdiction in the case seemed absolutely clear. Neither the decision nor the reasoning employed in the *Vera Cruz* affected the decisions in the *Uhla* and the *Chase*, and I consider I am bound by these decisions, and that the Maritime Court of Ontario has jurisdiction over claims of the kind set out in these cases.

The question remains whether the present case comes under the same rule.

In those cases the injury complained of was caused directly by the vessel against which the claim was preferred. The vessel itself came in contact with and injured the wharf. In the *Industrie* that was not done. The injury was occasioned by the injured vessel attempting to avoid the other, in consequence of which it got aground, and as a further consequence was driven against the lower wall and injured. It was held that the Court of Admiralty had jurisdiction, and that the vessel whose fault caused the deviation of the other, was responsible. The case of the *George & Richard* (*u*) was a case of limitation of liability established on behalf of the owners of that ship against the owners of a barque and others interested in having any right, etc., with reference to a collision which occurred between the two vessels in consequence of the improper navigation of the *George & Richard*. The barque was badly injured by the collision, the greater part of the crew remained on board, and the next day, a heavy gale blowing, she was driven ashore and a

(*s*) L. R. 2 App. Ca. 743.
(*t*) 2 Stu. V.-Ad. 361.
(*u*) L. R. 3 A. & E. 466.

number of the men drowned. The barque had been rendered almost helpless by the collision, and a large part of her rigging was carried away. It was held that the loss of life was occasioned by the collision.

In the judgment in that case many cases are referred to in which the question of liability for consequential damage is discussed, and Sir Robert Phillimore says the general rule to be deduced is that the rational and proximate consequences of the tortious act are the proper subject for consideration. This is no doubt the rule commonly laid down on the subject.

In the present case the immediate result of the negligence of those on board the *Walter S. Frost* was the breaking the lock gates. It necessarily followed that the water in the upper level of the canal above the lock escaped and ran into the lower level, which was not high enough to hold the water of both levels, and it therefore escaped over the banks and ran over the plaintiff's farm. It may doubtless be said that but for the peculiar position and construction of the canal, which was raised above the adjoining country, the injury would not have happened. I have no doubt this is true. However, neither the plaintiff nor the defendant have any control over or responsibility for the position of the canal. It is a public work open to be used by those who require it. I must assume that it is sufficient for practical purposes in the ordinary way, and that when properly used, water does not run over the banks. The defendants, when they use it, must take it in the condition in which it is, and if the natural and probable consequence of an escape of water from an upper to a lower level is that water will escape over the banks of the lower level and do injury, they must take care not to be guilty of any wilful or negligent act that would probably produce that result, and if they do such act they must be responsible for the injury.

I think the damage done to the plaintiff was the natural and proximate consequences of the breaking of the lock gates, and that this Court has jurisdiction to entertain the case, and that if the facts are as stated in the petition the defendants are liable.

NEW BRUNSWICK.

In the Supreme Court.

Ex parte PHILLIPS.

Summary Convictions Act—Certificate of dismissal—Where informant does not appear—Right to grant—Subsequent complaint for same offence—Whether bona fides of Justices in granting certificate can be inquired into—Canada Temperance Act, 1878.

Held, by Allen, C.J., Weldon, Wetmore, King and Fraser, JJ., that the certificate of dismissal provided for by the 43rd section of the Summary Convictions Act may be granted as well where the informant neglects to appear, and the complaint is dismissed on that ground, as where he does appear and the information is dismissed on the merits.

Per Palmer, J. Such certificate can only be granted where the information is dismissed after hearing.

Held, also, Weldon and Wetmore, JJ., dissenting, that the magistrate or other officer before whom an information for an offence against The Canada Temperance Act is being heard, if a certificate of dismissal of a prosecution for the same alleged offence is relied on as a bar to his proceeding, has a right to inquire whether the previous prosecution was real and *bona fide*, or was instituted fraudulently and collusively.

ACKMAN v. TOWN OF MONCTON.
LANDRY v. THE SAME.

Municipal taxation—Employee of Federal Government—Income, assessment of.

A. was an employee of the Intercolonial Railway Company in the capacity of a clerk in the general offices of the railway at the town of M. where he resided. He received from the Government of Canada a salary at the rate of $600 per year, payable monthly for his services as such clerk, and had been so employed for the space of three years, but such employment might be terminated at any time by the Railway Department on giving fourteen days notice. A. did not contribute to the superannuation fund of the Civil Service of Canada, and had not been appointed to such service as provided by the Canada Civil Service Act, 1882, or otherwise. It did not appear whether or not his salary was fixed by the Governor General in Council. A. was assessed in the town of M. for municipal purposes on his income, and on the question being stated for the opinion of the Court,

Held, by Weldon, Palmer, King and Fraser, JJ., Allen, C. J., dissenting, that the case came within the principle of *Ex parte Owen*, 4 P. & B. 487, and that such income was not subject to assessment.

L. was an employee of the Intercolonial Railway, employed as a painter of cars in the works of said railway at the town of M. where he resided. He was paid by the Government, through the management of the Railway, fifteen cents per hour for each hour that he was so employed, and

was paid monthly therefor. At the time of the assessment mentioned below, he had been so employed for two years, but his employment might be terminated at any time by the Railway Department on giving fourteen days notice. He was assessed in the town of M. for municipal purposes on his income derived from such labour and employment.

Held, by Allen, C.J., Weldon and Palmer, JJ., King and Fraser, JJ., dissenting, that L.'s case did not come within the principle of *Ex parte Owen*, and that the assessment was rightly made.

McCALL v. GILLESPIE.

Sale of Goods—Consignor and Consignee—Where security to be given —Passing of property.

G. residing in this Province, ordered goods from the plaintiff at Quebec, promising to give a note for the price indorsed by the defendant. The plaintiff sent the goods to G. with the invoice, and wrote requesting him to send a note for the amount with the defendant's indorsement, and shortly afterwards the defendant got possession of the goods under a bill of sale from G. In trover for the goods, the jury were directed that if the plaintiff forwarded the goods to G. fairly expecting he was to receive a note indorsed by the defendant, the property in the goods would remain in the plaintiff and he would be entitled to recover.

Held, misdirection; that, if in the opinion of the Judge, there was evidence of it, it should have been left to the jury to find whether the agreement was that the property should not vest in G. unless the note indorsed by the defendant was received.

Ex parte CLARK.

County Court Appeal—Judge certifying proceedings—Time within which appellant must apply for—Bond on appeal—Perfecting of—Notice of to Judge—Necessity for.

A County Court Judge cannot refuse to certify proceedings on appeal to the Supreme Court, although the appellant does not apply to him to do so until more than thirty days have elapsed from the filing of the bond with the clerk.

Held, by Allen, C. J., and Fraser, J., Weldon and Wetmore, JJ., dissenting, that when a party is desirous of appealing from the decision of the County Court, it is his duty to furnish the Judge with evidence that the bond on appeal has been perfected and deposited with the clerk.

REGINA v. SULLIVAN; *In Re* DWYER.

Canada Temperance Act, 1878—Conviction for first offence—Where wrong form used—Power of Court to amend.

In a conviction for a first offence under The Canada Temperance Act, the form (I 1) given by the Summary Convictions Act (32-33 Vict. cap. 31) awarding distress for nonpayment of the fine, and in default thereof, imprisonment, must be adopted, and not the form (I 2).

Where, in such a case, the form (I 2) is adopted, it is not amendable under the 117th and 118th sections of The Canada Temperance Act.

McCULLY v. NOONAN.

Practice—Affidavits—Determining the sufficiency of before applying for time to answer.

Held, Wetmore, J., dissenting, that on a motion heard on affidavits, the party moving must elect at the time the affidavits in opposition are read, whether he will then argue the case, or apply for time to answer them. There should be but one argument; and that, when all the facts are before the Court.

STEEPER v. HARDING.

Trespass q. c. f.—Adjoining proprietors—Dividing line run by surveyor mutually agreed upon—Acquiescence.

A dispute having arisen between adjoining land-owners as to the boundary between them, they mutually agreed upon a surveyor to run the line, which he did. One owner then without objection on the part of the adjoining proprietor built a fence on the line so given by the surveyor.

Held, a sufficient acquiescence to establish it as a conventional line.

ABBINETT v. THE NORTH WESTERN MUTUAL LIFE INSURANCE CO.

Costs of former suit—Second suit for same matter—Staying proceedings.

A. died, having effected a policy of insurance on his life for the benefit of his wife, and payable to her. The widow brought an action in her own name to recover the amount of the policy, and was nonsuited on the ground that the action should have been brought by A.'s representative. She then brought an action as administratrix. On application to stay proceedings until the costs of the former suit were paid,

Held, following *Pashley v. Poole*, 3 D. & R. 53, that the second action was not vexatious, and the application was refused.

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EQUITABLE INTERESTS AND THE REGISTRY ACT.

Generally.—Before the Act of 1865, equitable interests were not affected by the Registry laws. It is true that the Act 13 & 14 Vict. cap. 63, in express terms declared that nothing contained in it should affect either the equity doctrine of purchase for value without notice, or the rights of equitable mortgagees as recognized in the Court of Chancery. But there is no apparent difference in the cases decided before, and those decided after, this Act. Indeed, Esten, V.C., said that the mention of the rights of equitable mortgagees was only *exempli gratia* (*a*); and all equitable interest were in truth excepted. But it was said that, as between persons having equitable interests, priority might be gained by prior registration, subject to its effect being defeated by notice (*b*).

An equity to reform a conveyance in trust for creditors, by inserting a parcel of land omitted by mistake, was under the old law enforced as against a subsequent registered judgment creditor (*c*). Even as against a subsequent grantee, however innocent, the equity would have been kept alive (*d*); and an equitable mortgage created by deposit of

(a) *McMaster* v. *Phipps*, 5 Gr. 261.

(b) *Bethune* v. *Calcutt*, 1 Gr. 81. The contest in this case was between third and fourth mortgagees, whose interests, though in fact equitable, were evidenced by instruments capable of registration, and therefore within the Act.

(c) *McMaster* v. *Phipps*, 5 Gr. 253.

(d) *Wigle* v. *Setterington*, 19 Gr. 519.

mortgage deeds, accompanied by a memorandum in writing signed by the mortgagor, agreeing to execute a power of attorney to empower the mortgagee to transfer or control the mortgages so deposited, was held not to require registration (*e*).

In 1865, the Act 29 Vict. cap 29, was passed, by section 66 of which it was enacted that "no equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns." This enactment was continued by the Act of 1867, and reproduced in section 81 of R. S. O. cap. 111.

This enactment was said by Mowat, V. C., not to be retrospective (*f*), but in subsequent cases (*g*) this view was not adopted. In *Bell* v. *Walker*, Blake, V.C., said, "It is said the registry laws do not apply, because the equity of the plaintiff had arisen before the passing of the Act under which the defendant seeks protection. The first of these Acts, which was passed on the 18th September, 1865, did not come into force until the 1st January, 1866. Over two months were thus given in which to assert these rights, and after that period they were not to be deemed valid in any Court in the Province. It is clear this clause strikes at all such claims, no matter when they may have arisen. To hold otherwise, would be to postpone for many years the full effect of this salutary enactment, without anything in the Act to warrant such a construction."

It will be noticed that the Act deals with the case of an equity as against a registered instrument (*h*). Possibly those equitable liens, charges, or interests aimed at by this section are such equities only as are incapable of registration (*i*)—such equities as those mentioned by Blake, C., in

(*e*) *Harrison* v. *Armour*, 11 Gr. 303.

(*f*) *McDonald* v. *McDonald*, 14 Gr. 133.

(*g*) *Bell* v. *Walker*, 20 Gr. 558; *Grey* v. *Ball*, 23 Gr. 390; *Miller* v. *Brown* 3 Ont. R. 210; *Core* v. *Ont. L. Co.*, 5 C. L. T. 22.

(*h*) See *Grey* v. *Ball*, 23 Gr. at p. 394.

(*i*) *Forrester* v. *Campbell*, 17 Gr. at p. 385.

McMaster v. *Phipps* (*j*)—equitable rights arising out of parol agreements partly performed, resulting trusts where land has been purchased with the money of one and the conveyance taken in the name of another, an equitable right to set aside a deed for fraud, or undue influence, or on grounds of public policy, a vendor's lien, or an equity to reform a deed or mortgage. Such equities are not created by written instruments and are incapable of registration. They do not all come within the peculiar wording of the section. For instance, a purchaser's right to enforce specific performance of a parol agreement to sell land partly performed, is not an equity that can by any possibility conflict with "a registered instrument executed by the same party," and the like must be said of a resulting trust. On the other hand, an equitable right to set aside a deed obtained by fraud or undue influence, or a right to enforce a vendor's lien where the conveyance has been delivered and registered, are both rights which are necessarily set up against instruments executed by the parties complaining. No distinction, however, can be made between them, both classes being undoubtedly void and incapable of enforcement as against the registered title. But a party claiming under a registered instrument, taken and registered with notice of a prior equity, takes subject to the equity (*k*). The conscience of the party so claiming under a registered instrument is affected by the notice which he has acquired, and "it never was the intention of the legislature to give a priority of right to commit a fraud" (*l*).

It has been pointed out by Mowat, V.C., that it is not every equitable interest that is avoided as against the registered title (*m*); and he instances conveyances and mortgages of equities of redemption, interests arising under trust deeds, written contracts for the sale of lands. With

(*j*) 5 Gr. at p. 258.

(*k*) *Forrester* v. *Campbell*, 17 Gr. 379; *Wigle* v. *Setterington*, 19 Gr. 512; *Bank of Montreal* v. *Baker*, 9 Gr. 298.

(*l*) *Latouche* v. *Lord Dunsany*, 1 Sch. & L. at p. 159.

(*m*) *Forester* v. *Campbell*, 17 Gr. at p. 384.

regard to all equitable interests created by deed or other instrument capable of registration, it may be said that they do not come within the section under consideration. Section eighty of the Registry Act enacts that "priority of registration shall prevail, unless before such prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration." By this section the priorities of competing equities created by instruments capable of registration are settled; for it manifestly refers to instruments capable of registration, whether they create legal or equitable interests. A distinction must therefore be drawn between such equities, and those which are not evidenced by instruments capable of registration. The former are governed by section eighty of the Act, while the latter are dealt with by the eighty-first section. A second mortgagee loses his priority if he does not register before a third mortgagee without notice—not because his estate is an equitable one, but because priority of registration is to prevail (*n*).

Tacking.—Amongst other equities there is the right of a mortgagee to tack, which has been destroyed in so far as it interferes with the registered title. Before 13 & 14 Vict. cap. 63, registration not being compulsory, and not being *per se* notice, the doctrine of tacking was not affected by the registry laws (*o*). But by section four of this Act it was recited that the doctrine of tacking had been found to be productive of injustice, and it was enacted that thereafter conveyances should be taken according to priority of registration. It also abolished tacking as between unregistered mortgagees, for it declared that where the conveyances were unregistered, they should be taken in order of the time of their execution. The law remained thus until 31 Vict. cap. 20, when it was enacted by section 68 of the Act that tacking should not prevail against the provisions of the Act, and all previous Acts were repealed. The result of this is that tacking may take place apart from the Registry Act; but as against that enactment it shall not prevail.

(*n*) See *Cooley* v. *Smith*, 40 U. C. R. 543.
(*o*) *Street* v. *Commercial Bank*, 1 Gr. 169.

This enactment is reproduced in the latter part of section eighty-one of the Registry Act (*p*).

Consolidation.—Consolidation must not be confounded with tacking, though it was attempted in one case (*q*), where the plaintiff company claimed to consolidate their mortgages, to show that the provisions of the Registry Act as to tacking prevented it.

Though there is no express legislation respecting consolidation, it is affected indirectly by the Registry Act. Spragge, C., laid it down that "the policy of our legislation has been to allow no effect to occult equities, and in the case of transfers of real estate, whether absolutely or by way of mortgage, that men dealing in real estate should be able to find the state of the title by search in the registry offices, and in one or two other public offices" (*r*). The right to consolidate is a mere equity, and though it may be enforced against the mortgagor, the mortgagee claiming the right as against a puisne incumbrancer of one estate must establish notice of the equity as against him (*s*). And so where the plaintiff held three mortgages upon estate A., and the defendants held a first mortgage thereon, and also a mortgage upon estate B. from the same mortgagor for a different debt, it was held that they could not consolidate as against the plaintiff, he having taken his mortgages of estate A. without notice of the defendants' right of consolidation as against the mortgagor (*t*).

(*p*) See *Dominion Savings Society* v. *Kittridge*, 23 Gr. at p. 634.

(*q*) *Dominion Savings Society* v. *Kittridge*, 23 Gr. 634; and see *Brower* v. *Canadian Perm. Building Society*, 24 Gr. 570.

(*r*) *Johnston* v. *Reid*, 29 Gr. 299.

(*s*) *Dominion Savings Society* v. *Kittridge*, 23 Gr. 635.

(*t*) *Brower* v. *Canadian Perm. Building Society*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 293.

EDITORIAL REVIEW.

British Columbia Law Reports.

We have received the second part of Volume II of these Reports. A number of interesting cases are reported.

In the first case, *Johnston* v. *Clarke*, the full court affirms Chief Justice Begbie in deciding that, in questions relating to boundaries and descriptions of land the rule is that the work on the ground governs; thus adopting the doctrine so well known in our own Province.

In *Wilson* v. *Hudson's Bay Co.*, a writ was served on the defendant company's manager at Victoria, B. C. The head office of the company is in England, though there is a place of business in Victoria. Walkem, J., held that inasmuch as by the company's rules the power to appoint, pay, and dismiss was with the English office, and as, by agreement, the account was kept at that office, and the balance due from time to time to the plaintiff's intestate was payable there, the English office must be regarded as the domicile of the company, and the company could not be sued in British Columbia. This is opposed to the spirit of modern decisions, which in a liberal manner hold a corporation to be resident where it is carrying on business: *Newby* v. *Van Oppen*, L. R. 7 Q. B. 295. See the cases cited in "Residence of a Corporation," 4 C. L. T. 314.

It appears that if an execution creditor in British Columbia makes any money on an execution, any clerk, servant, labourer, etc., to whom the debtor is indebted for wages may on summons procure a preferential order for payment out of the money made, and the creditor stands by helpless. In *Muirhead* v. *Lawson*, the creditor applied to have himself appointed receiver without taking out a

fi. fa., there being nothing that an execution could reach. It was held that a servant had no preferential claim under the act as against the receiver.

In *Regina* v. *Rogers*, counsel for the prisoner, who was on trial for murder, did not offer any evidence, but, after his address asked the court to permit the prisoner to address the jury, citing *Regina* v. *Shimmin*, 15 Cox C. C. 123. Mr Justice Crease permitted the address to be made, saying, "I think the case cited, coming after the date of the meeting of the English Judges mentioned in the *Law Times* for 1883, p. 100, has settled the practice permitting a prisoner to make a statement of facts to the jury, if he chooses after his counsel has addressed them. The defect in such a statement is that it is not on oath—and is given under great temptation—and therefore not entitled to any great weight as against sworn testimony, and may be used against the prisoner. Counsel for the Crown, of course, in such a case has the right to reply."

On a prosecution for wounding with intent depositions were allowed to be read on the following proof of absence from Canada of the deponent:—"C. is to the best of my knowledge in the U. S. A. He was employed about ten days ago on a steamer then running between Victoria and an American port. He said when he left me he was going on board the steamer. The steamer has not been on that route since. She is now running between two American ports." See *Regina* v. *Nelson*, 1 Ont. R. 520; 3 C. L. T. 26, on the same point.

In *Regina* v. *On Hing*, the court followed *Regina* v. *Howard*, 4 Ont. R. 377, and decided that a municipal corporation had no power to include buildings already erected in the terms of a by-law defining fire limits and directing that no wooden buildings within the limits should be altered without permission.

Wing Chong, a fellow countryman of the last named defendant, has settled that the "Chinese Regulation Act, 1884, is *ultra vires* of the Provincial Legislature, because, "(1) it is an interference with the rights of aliens; (2) it is an interference with Trade and Commerce; (3) it is an

infraction of the existing treaties between the Imperial Government and China; (4) it imposes unequal taxation. The right of a Province to impose restrictions upon aliens (except in so far as it may make laws respecting property, etc.) may well be doubted. The principle of the decision is exemplified in *Re Wetherell* v. *Jones*, 3 C. L. T. 499. The question of unequal taxation is an important point. The act in question imposes a poll-tax of $10 a year on every Chinaman. The same point was decided in Manitoba by Chief Justice Wood in *Hudson's Bay Co.* v. *Att'y-Gen. of Manitoba*, Man. Rep. temp. Wood, 209. A tax of 5 cents an acre was imposed upon the land of every non-resident, while but one cent an acre was imposed on residents' lands; and of the latter 640 acres were exempt. The learned Chief Justice held that as the tax was unequal the act imposing it was *ultra vires*. He said, in one passage, "In a legal and constitutional point of view, it would be just as sensible to make the discrimination rest upon the nationality, the age or the colour of the complexion of the owner, as on his residence or non-residence, in Manitoba."

A number of practice cases are also contained in the number.

The Judiciary and Politics.

We have before expressed ourselves as strongly, uncompromisingly, opposed to a Judge's leaving the Bench to return to a practice at the Bar. Every member of the Profession in Canada knows that the salaries of the Judges will not do more than keep them in pocket money, and any man who ascends the Bench does so with full knowledge of what he is doing.

But there is something particularly obnoxious in a Judge's retiring from the Bench to go into politics. While the Bench is regarded with unqualified respect and reverence, party politicians are regarded with suspicion. To go from the Bench to politics is toshake the confidence of the people in the purity and independence of the Bench. Whether the Judge is approached, or of his own motion enters the arena, makes no difference. The public do not

like to think that Judges may be contemplating indulgence in political warfare at the first convenient opportunity, nor do they like to think that they may not only be approached at any time when party exigencies require it, but that they are open to negotiations for party prizes. Party politics pervade the whole existence of Canadians. They affect social relations, and business connections; and every man who is attached to a party sacrifices his independence of thought and action.

In one point especially is it important that the Bench should be completely severed from anything like connection with party politics. The Judges try election cases. It has happened more than once that a Judge has been severely criticised for his decision in an election case by party newspapers. And if it is to be considered a proper thing for a man to retire from judicial life in order to engage in party politics, the party press will not be slow hereafter to make insinuations as to motives for decisions in election trials.

The retirement of Mr. Justice Thompson from the Bench to become Minister of Justice is in this respect most unfortunate.

The Law in Riel's case.

The *Manitoba Law Journal* says that the points determined in Riel and Connor's cases (the latter reported 2 Man. R.), may be summarized as follows:—

"1. A stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge of murder or treason in the North-West Territories.

2. The information may be laid before a stipendiary magistrate alone. An associate justice of the peace is necessary for the trial only.

3. Except for the purpose of arrest, it is not necessary that there should be an information at all, nor need the trial be based upon an indictment by a grand jury, or a coroner's inquisition. All that is necessary is a charge, and this need not be under oath.

4. The evidence may be taken in short-hand.

5. Writs of *certiorari* and *habeas corpus* cannot be issued by the Court of Queen's Bench in Manitoba to bring up the papers and prisoner upon an appeal to that Court.

6. The Court of Queen's Bench will hear an appeal in the absence of the prisoner."

The fifth holding determines the points raised by a contributor in an article in Volume IV of this journal, at page 309. Our contributor, a resident of the North-West Territories, had little idea that his queries would be solved as soon as they have been, and in as serious a case as that which set them at rest.

Queen's Counsel.

The following gentlemen have been appointed Her Majesty's Counsel by the Governor-General :—

S. H. Blake, W. G. Falconbridge, W. A. Foster, Hugh MacMahon, William Laidlaw, Charles H. Ritchie, James H. Morris, W. N. Miller, James F. Smith, James H. Macdonald and W. A. Reeve, of Toronto; Ephraim J. Parke, James H. Fraser, Henry Becher and Edmund Meredith, of London; Edward Martin and Alexander Bruce, of Hamilton; Charles R. Atkinson and William Douglas, of Chatham; James P. Woods and John Idington, of Stratford; John Wesley Beynon, of Brampton; Hugh M. Wilson, of Brantford; Robert Cassels and Alexander J. Christie, of Ottawa; Donald Guthrie and Alexander Dunbar, of Guelph; Colin McDougal and Charles O. Z. Ermatinger, of St. Thomas; Henry H. Strathy, of Barrie; James T. Garrow, of Goderich; Edward H. Smyth, of Kingston; James Masson of Owen Sound; and A. P. Poussette, of Peterborough.

Sheppard's Case.

Perhaps nothing has brought more forcibly home to us the unity of confederation than the arrest of Mr. Sheppard in Toronto to stand his trial in Montreal for the publication of a libel. At first most people were surprised, but consid-

eration compelled the admission that Canada reached from the Atlantic to the Pacific, and that as far as the criminal law is concerned there are no provincial boundaries.

The allotment of the criminal law to the jurisdiction of the Parliament of Canada was dictated by prudence, and dispenses with the necessity which would otherwise have existed for interprovincial extradition.

BOOK REVIEWS.

A Manual of the Practice of the Supreme Court of Judicature in the Queen's Bench and Chancery Divisions. Intended chiefly for the use of students. Fourth edition. By JOHN INDERMAUR, Solicitor, etc. London: Stevens & Haynes, 1885.

This handy little book is based on the new English rules, and though readable enough for a practice book is apt to mislead the unwary in this Province.

Lewis' Law of Shipping, being a treatise on the law respecting the inland and sea coast shipping of Canada and the United States. By EDWARD NORMAN LEWIS, of Osgoode Hall, Barrister-at-Law. Author of "The Inland Marine Manual," "Ontario Statute Index," "Magistrates' Manual." Toronto: Carswell & Co., 1885.

The knowledge of Maritime Law is confined to a few practitioners, and is in fact needed only by a few. Mr. Lewis has therefore a small constituency. A large amount of information is bound up in the book—such as coasting regulations, navigation rules, acts relating to carriage of dangerous goods, seamen's certificates, etc. Forms for registration are also given. As regards the treatise, the learned author has compressed his text into a small space. Paragraph follows paragraph in short concise language, making rather a collection of headnotes than a treatise. The notes and references to cases are compiled at the end of each chapter or part. One never relies entirely on the text of an author; the authorities referred to are always consulted. And in this view we can commend the learned author for not extending his text to too great a length. It is a healthy sign to see conciseness made a point of in text writing when books are growing at such a rate as they are now.

REVIEW OF EXCHANGES.

Albany Law Journal.—22nd August, 1885.

Common Words and Phrases.—Branch, Traveller, Business or Vocation, Harvest, Caused to attend school, Domestic use, are defined.

Malicious Prosecution of Civil Suit, by GUY C. H. CORLISS. Continued from the previous number. Although a civil suit has been commenced without malice and with probable cause, yet if such suit be carried on with malice, and after the plaintiff has ceased to have any probable cause for the continuance of the suit, the plaintiff will be liable in an action on the case for malicious prosecution. In England, before the Statute of Marlbridge, passed in the fifty-second year of Henry III., no costs were recoverable in civil actions. This statute and others subsequently enacted gave costs to the successful defendant, as it is said by way of damage against the plaintiff *pro falso clamore*. The present English rule, therefore, restricts the right of action for maliciously prosecuting civil suits without probable cause much more narrowly than that prevailing in many of the States of the American Union. In these the ancient common law remedy is operative still in all cases where the taxation of costs is not an adequate compensation for the damages sustained. Whether the cause of action is an unfounded civil or criminal prosecution, the plaintiff must show that the proceeding or suit has terminated in his favour. But it is not necessary that there should be a trial or a judgment in favour of the defendant; a voluntary discontinuance of a civil action by the plaintiff is sufficient. The weight of authority inclines to the doctrine that a judgment in favour of the defendant in a malicious prosecution suit is conclusive on the question of probable cause, even though the judgment is afterwards reversed for error, provided there has been no fraud or unfair means resorted to by the defendant to secure such judgment. In actions for damages by reason of a civil suit, both malice and want of probable cause must be proved; the absence of proof of either is fatal to a recovery. American cases are cited.

Ibid.—5th September, 1885.

The Lauderdale Peerage Case, by HUGH WRIGHTMAN. An interesting discussion of the decision of the committee of privileges in the House of Lords in this celebrated case. The learned writer suggests the difficulties to be encountered by the new peer, should claim be made on his behalf to lands in England, where the *lex loci rei sitae* may not so fortunately fit in with the peculiar facts of his case, as did the Scottish law which affirmed his legitimacy.

Ibid.—10*th October*, 1885.

Partnership Real Estate, by GUY C. H. CORLISS. Concluded in the following numbers. A conveyance of land to two or more, not describing them as partners, vests in them a title as tenants in common. Can extrinsic evidence be resorted to in order to establish that the property is held by the grantees as partners? In all the States but Pennsylvania the terms of the deed are not conclusive, but may be modified upon proof of the circumstances showing an intention or agreement to purchase and hold the property as partnership property. The rights of a bona fide purchaser will of course be protected. The intention of the partners at the time of the conveyance furnishes the test. The agreement may be verbal. The use of partnership funds as purchase money is evidence of the intention, as is the subsequent user of the property for the purposes of the firm. Where the intention is clear, it is immaterial if the title be in the name of one of the partners, or of a third person; whoever takes holds as trustee for the firm. American cases are cited.

Ibid.—17*th October*, 1885.

Partnership Real Estate, by GUY C. H. CORLISS. Continued. The English Courts have uniformly treated partnership real estate as personal property for all purposes, except its transmission on the death of the owners, after paying debts and adjusting the equities between the partners. In more recent English cases the weight of authority is in favour of holding it absolutely converted for all purposes whatever. In *Thornton* v. *Dixon*, 3 Bro. Ch. Cas. 199, Lord Thurlow first inclined to the view that the personal representatives would take; but he subsequently came to a different conclusion, and decided that the heirs took their ancestor's share after paying debts, etc. But in *Townsend* v. *Devaynes* (1 Montagu on Partnership, App. 101), Lord Eldon overruled the prior decisions, and held that the conversion was unqualified, and that therefore the personal representatives took instead of the heirs. This view was followed in *Selkrig* v. *Davies*, 2 Dow P. C. 231; *Phillips* v. *Phillips*, 1 Myl. & Keen, 649; *Morris* v. *Kearsley*, 2 Young & Coll. 139, and other cases—the latest being *Attorney-General* v. *Hubback*, L. R. 13 Q. B. D. 275. This rule is not followed in the United States. The learned writer proceeds to treat of the questions of dower interests, disposal of the land upon a winding up, and other matters.

Ibid.—24*th October*, 1885.

Common Sense and Legislation, by JAMES W. PRYOR. A protest against the annual crop of hap-hazard statutes, which tend to unsettle the law while increasing its already sufficient bulk, turned out by state (and provincial) legislatures. The learned writer's arguments carry conviction to all readers, but among the latter he will not, unfortunately, number the Statesmen whose meddlesome proclivities he deplores. There is no money in perusing legal periodicals, but frequently not a little in voting through unjust, oppressive and totally unnecessary statutes.

Partnership Real Estate, by GUY C. H. CORLISS. Concluded. Remarks upon *Page* v. *Thomas*, 1 Western Reporter, 21.

American Law Review.—May-June, 1885.

The Competency of Witnesses as Dependent upon their Moral Status, by STEWART RAPALJE. The nature and extent of the religious belief necessary to render a witness competent to testify are considered, as well as the methods whereby this may be legally ascertained. Various statutory enactments effecting a total or partial abolition of incompetency upon this ground are examined. The common law rule excluding the testimony of infamous persons is explained, together with what constitutes infamy in contemplation of this rule and how it may be proved. Remarks upon the evidence of accomplices conclude the article.

Contracts of Married Women under Statutes, by DAVID STEWART. The subject is reduced to rules, which are then separately treated, with very numerous references to cases.

The French Law of Evidence, by EDMOND KELLY. A comparative study of the principles of English and French law upon the subject. A most valuable contribution.

Railroad Receiverships—Questions of Practice Concerning Them, by M. M. COHN. The jurisdiction and duties of Courts with reference to this branch of the law, which is belived to be still in a state of development, are considered, and very excellent suggestions made as to the directions in which that development may advantageously proceed.

Ibid.—July--August, 1885.

Police Control of Dangerous Classes, other than by Criminal Prosecutions, by C. G. TIEDEMAN. After an enquiry into the fundamental nature of the "liberty" enjoyed by members of a highly civilized community, as contrasted with the absence of restraint common among the less enlightened nations, the learned writer proceeds to investigate the grounds upon which the State's right to confine the lunatic or idiot, the vagrant and beggar, the habitual drunkard, or habitual criminal, and person suffering from infectious or contagious disease, may be said to rest. The protection of society at large is the chief, while others are furnished by recognition of the relation of wardship in which certain classes stand to the State, or paternal governing power. Constitutional questions affecting legislation upon these subjects are discussed.

Title to Dividends, by EDWARD C. MOORE, Jr. The subject is treated in two parts; (i) title as between shareholders and the corporation or its creditor. (ii) title as between successive absolute owners of shares.

The Competency of Witnesses as Dependent upon their Mental Status, by STEWART RAPALJE. At common law the disqualifications which rendered a witness incompetent to give any evidence at all were, (i) insufficient understanding; (ii) refusal to be sworn or to acknowledge the sanction of an oath; (iii) infamy arising from the conviction of crime; (iv) the position of the proposed witness as a party to the contro-

versy under investigation; and (v) his being interested in the event of the matter in issue to any extent, no matter how trifling. The first of these qualifications is examined, and the statutory changes, both in England and America, which have from time to time circumscribed and limited the application of the common law rule, are noted.

The Mutual Remedies of Co-Owners of Chattels, by E. B. CALLENDER. Trover, replevin, and other remedies are considered.

Ibid.—September—October, 1885.

The Legal Profession in England—its History, its Members, and their Status, by T. W. TEMPANY. Mr. Tempany describes very fully the origin and growth of the four Inns of Court, and the course now necessary to be followed in England for call to the Bar; also the course of study prescribed by the Incorporated Law Society and other requisites for admission to practice as a solicitor. The peculiar duties of counsel and solicitor are contrasted.

Expert Evidence as to Increase of Risk, by JAMES O. PIERCE. Is the testimony of experts concerning a supposed increase of risk, in questions of fire or marine insurance, when the fact of such increase is a matter for enquiry by the jury, admissible? Such testimony is excluded in the Courts of several States, upon the supposed ground that such evidence is not within the field of science or special skill, being upon matters within the common experience of mankind. But it is argued that "risk" and "increase of risk," being in their nature not questions of fact, but of probability merely, the testimony of experts, or men whose experience qualifies them to judge of probabilities, is of supreme importance, and is, in fact, the only satisfactory evidence; it should, therefore, be admissible.

Railway Delinquencies, by W. L. MURFREE, Sr. The subject is treated under the following heads; (i) general liability of railroads as carriers; (ii) receivers of railroad corporations; (iii) limitations upon the powers of railroad corporations; (iv) the leasing of a railroad; (v) the contract of a common carrier in general; (vi) equal rights of all persons to the services of common carrier; (vii) what is an unjust discrimination; (viii) state taxation of interstate commerce; (ix) remedy of party aggrieved; (x) penalty prescribed by statute for unjust discrimination or extortion; (xi) drawbacks and rebates; (xii) express companies entitled to equal facilities; (xiii) the general principle; (xiv) imperfections of State powers to regulate interstate commerce; (xv) what is interstate commerce? (xvi) what is the regulation of interstate commerce? (xvii) the contemplated action of Congress upon the regulation of interstate commerce. Under the last head the Reagan Insterstate Commerce Bill is criticised.

Title to Dividends as between Life Tenants and Remaindermen, by EDWARD C. MOORE, Jr. The interests are apt to conflict where wills or settlements give shares of stock in trust to pay the divi-

dends, income, profits or proceeds to one person for life with remainder over to another. Usually the life tenant takes all the regular dividends declared during his life, even those not yet payable at his death; but not those declared before, though payable after the commencement of his life estate. But questions of more difficulty arise when extra or extraordinary dividends or bonuses are declared, either as stock, or cash dividends. Where ascertainable, the intention of the testator or settlor controls; where not, it is difficult to extract a general rule from the decisions. The earlier English cases appear to favour the remainderman, the later, the life tenant. "The only deductions which can be made are that the tendency of the later cases is to hold that a corporation may rightfully retain its profits if expedient; that while extra dividends or bonuses usually go to the corpus and not to the income of a trust, still the decision in each case must rest upon the actual intent and substance of the corporate action and all the circumstances connected therewith; that it is material to consider whether the bonus is declared from profits, and if so, whether those profits accrued before or after the creation of the life estate in the shares; but that no apportionment of a bonus can be made between the life tenant and the remainderman, if those profits accrued in part before, and in part after the creation of the life estate."

Central Law Journal.—12*th June*, 1885.

Real Estate Broker's Compensation. In the absence of special agreement, the law allows the broker a reasonable or customary commission. This may be by per centage, an agreed amount, or all beyond a given price. The broker may have the *exclusive* right to sell; but generally the owner may himself find a purchaser without incurring liability for the broker's commission. The broker may himself become the purchaser, if all is above board and the owner, with knowledge of the fact, consents. In such case the broker would not be entitled to his commission, unless by special agreement. To recover his commission the broker must prove (1) that he was employed, and (2) that he found a purchaser ready, able, and willing to complete the purchase on the terms specified. He must be the "procuring cause" of the sale, and must discharge all his duties with skill, care and fidelity. A principal desiring to discharge a broker must give him notice, without which he remains liable for the commission. He cannot revoke the authority after the broker has found a purchaser. The broker's duty is performed if he brings the parties together. English and American cases cited.

Ibid.—19*th June*, 1885.

The Rights of Gratuitous Passengers on Railways, by H. Campbell Black. Of late years this subject has received much attention in the Courts, but the adjudged cases have not yet approached unanimity. The more important cases are reviewed, and their variance or harmony noted. In the absence of stipulation or agreement to the contrary, it is clearly settled by the decisions of the Supreme Court of the United States (14 Howard, 468, and 16 Howard, 469), that the duty of carrying

passengers safely devolves upon the company, not merely in consequence of the consideration paid; but that it is imposed by the law, even where the service is gratuitous.

Can the company by any agreement or stipulation, expressly assented to by the passenger, limit its liability? Different rules prevail in different States. It is adjudged by the Courts of the State of New York, that the company may, by express contract with its passengers, legally exempt itself from all liability for loss or injury from whatever cause arising, save only the culpable negligence of its directors or managers. But the Supreme Court of the United States holds (17 Wallace, 357), that a carrier of goods or passengers for hire cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. In Pennyslvania it is held that while a common carrier cannot limit his liability so as to cover his own or his servants' negligence, he may, by contract, protect himself against his extraordinary liability beyond this, as a common carrier. The Courts of other States adhere to one or other of these ever varying doctrines.

Ibid.—3*rd July*, 1885.

Guaranty and Suretyships.—Actions against Makers and Endorsers of Negotiable Notes, by Wm. Archer Cocke. A discussion of the decisions upon the rules governing the determination of the question whether a party in certain cases is a mere guarantor, or whether he is a joint maker, or surety, or indorser of a bill of exchange or promissory note.

Ibid.—10*th July*, 1885.

Limitations in Insurance Policies as to Time of Bringing Suit, by Chas. E. Lyon. The law is not unfavourable to such conditions. But difficulties are sometimes experienced in determining when the period begins to run—whether from the date of loss, the injury of the property, or the time the right of action accrues to the insured. Whether a literal construction of the provision should be rendered, or one modified by consideration of other accompanying provisions in the policy is the matter discussed. The latter view is advocated.

Ibid.—24*th July*, 1885.

Proceedings in Rem, as affected by Death of Party, by J. O. P. Is a libel *in rem*, against a vessel or other property, in the Admiralty Court, converted into a proceeding *in personam* by the giving of a claimant's bond for all the property libelled, and appearance and defence by the claimant? The authorities tend toward a negative answer to the question.

Ibid.—31*st July*, 1885.

Libel—Newspaper Privilege, by Gideon D. Bantz. Privileged communications are divided into two classes, those which are absolutely privileged and those only conditionally privileged. These divisions are explained by reference to the cases. The subject of the nature and extent of the latitude allowed the public press, is then fully treated of.

Ibid.—4th September, 1885.

The Law of Ancillary Administration, by H. CAMPBELL BLACK. The final settlement of an estate must be made in accordance with the law prevailing at the place where the intestate had his home at the time of his death. But where the decedent leaves assets, and perhaps creditors, in another jurisdiction or in each of several jurisdictions, further letters of administration must be taken out. While the latter are generally called ancillary, no dependence or subservience upon the administration in the jurisdiction in the domicile is implied. Each is, within its limits, independent of the others, and there is no privity between the different administrators. The case law bearing upon the relative rights, and duties of the various administrators is fully examined.

Ibid.—11th September, 1885.

Liability of Property Owners for its Condition, by FRANK C. HADDOCK. The discussion is restricted to the responsibilities of owners of land for injuries arising from its condition and caused to neighbours, trespassers, tenants and others.

Ibid.—25th Setpember, 1885.

Limitations of Actions for Conversion, by A. J. DONNER. In an action of trover, the statute of limitations begins to run from the time of the conversion. The article deals with the questions, what acts constitute a conversion, and how its date may be determined; the doctrine of demand and refusal, retention as affecting title, effect of *bona fide* purchase, and choice of remedies.

Ibid.—2nd October, 1885.

"Accidents are not Crimes," by JOHN D. LAWSON. The cases cited are digested under the heads, (i) the ordinary actions of life; (ii) the use of dangerous agencies; (iii) the use of horses; (iv) the cure of disease; (v) the legal use of force. Lengthy abstracts from the charges and opinions delivered in the cases are made.

Ibid.—16th October, 1885.

Mechanics' Lien Laws—Who entitled to their Protection, by EDWIN VAN CISE. The language of the local statute in force where the claim is made, of course determines the question; but inasmuch as the ordinary provisions of this class of statutes are very similar, and in some instances precisely identical, the decisions of one State may be sometimes applied with advantage in another, either as directly in point or as illustrating a common principle. A large number of cases are referred to. In this Province a not uninfluential portion of the community have, from its first introduction into our statute book, regarded a lien law with disfavour, and an examination of the numerous decisions considered in this article is not calculated to confirm any previous good impression. A law which confers the interest of a *quasi* purchaser upon everybody—from the architect who draws the plans, the powder company which blasts the foundations, and the man who boards the workmen, to the lightning-rod man—beneficently "protects" everybody but the owner.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

EXCHEQUER COURT.]

THE WINDSOR & ANNAPOLIS RAILWAY CO. v. THE QUEEN AND THE WESTERN COUNTIES RAILWAY CO.

Petition of right—Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vict. cap. 16.

By an agreement entered into between the Windsor & Annapolis Railway Company and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the Windsor Branch Railway, N. S., together with certain running powers over the trunk line of the Intercolonial Railway Company, were leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under this agreement went into possession of the Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorized by the Government, (who claimed to have authority under an Act of the Parliament of Canada, 37 Vict. cap. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company, otherwise than subject to the rights of the Windsor & Annapolis Railway

Company,) ejected the suppliants from and prevented them from using the Windsor Branch and from passing over the trunk line; and four or five weeks afterwards the Government gave over the possession of the Windsor Branch to the Western Counties Railway Company, who took and retained possession thereof. In a suit brought by the Windsor & Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, etc., the Privy Council held that 37 Vict. cap. 16, did not extinguish the right and interest which the Windsor & Annapolis Railway Company had in the Windsor Branch under the agreement of 22nd September, 1872.

On a petition of right being filed by the suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the agreement of the 22nd September, 1871, the Exchequer Court of Canada, (Gwynne, J., presiding,)held that the taking of the possession of the road by an officer of the Crown under the assumed authority of an act of parliament, was a tortious act for which a petition of right did not lie.

Held, Strong and Gwynne, JJ., dissenting, that the Crown by the answer of the Attorney-General, did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so,and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach became possessed of the suppliants' property, the petition of right would lie for the restitution of such property, and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for monies received by the Western Counties Railway Company for the freight or passengers on the railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which an appeal in the cause had been taken, and which affirmed the judgment of the Supreme Court of Nova Scotia.

Per Ritchie, C.J., and Taschereau, J. The suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed, and had judgment for, as damages for a tort committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

Per Fournier and Henry, JJ. The suppliants were entitled to damages for the time they were, by the action of the Government, deprived of the possession and use of the road to the date of the filing of their petition of right.

Henry, Q.C., and *McCarthy, Q.C.*, for the appellant.
Lash, Q.C., for the respondent.

QUEBEC.]

PICHÉ v. THE CITY OF QUEBEC.

29 & 30 Vict. cap. 57, secs. 20 and 21—By-law in pursuance thereof—Validity of—Commercial traveller—Arrest of, for selling without license—Action for illegal arrest—Evidence—Amendment of pleadings by Supreme Court of Canada.

By 29 & 30 Vict. cap. 57, secs. 20 and 21, the City Council of Quebec was authorised to make any by-law to compel any transient merchant or trader, his agents, clerks or employees, or any person selling in the city by samples, to take out a license, and for a violation of the by-law to arrest any such person. On the 12th October, 1866, a by-law was passed fixing the license fee at sixty dollars, and giving power to the recorder to impose a fine not exceeding two hundred dollars upon any person convicted of contravening the by-law. One P., a commercial traveller for a firm in Montreal, was taking orders in Quebec for his firm, and had a small screw in his hand as a sample, when he was arrested by a policeman and brought to the police station. He subsequently paid the license fee, and brought an action against the Corporation, complaining of the false and illegal arrest and imprisonment. The Corporation by their plea, justified the arrest upon the ground that P. had openly committed a breach of the by-law and municipal regulations in force by selling by sample and without having first obtained a license.

Held, affirming the judgment of the Court below, Henry, J., dissenting, that there was sufficient evidence of a breach of the by-law to justify the arrest.

Per Strong and Fournier, JJ. The Court would permit an amendment of the pleadings which would adapt the allegations of the parties to the case as disclosed by the evidence, viz., that P. was following the occupation of a transient merchant or trader without a license in the City of Quebec at the time of his arrest. Henry, J., dissenting.

MacLaren, for the appellant.
Pelletier, Q.C., for the respondents.

SWEENEY v. THE BANK OF MONTREAL.

Stock held "in trust"—Purchase of by a bank—Effect of—Mandatory and pledgee, obligations of—Action to account—Arts. 1755, 2268, C. C.

S. brought an action against the Bank of Montreal to recover the value of stock in the Montreal Rolling Mills Company, transferred to the bank under the following circumstances:—S.'s money was originally sent out from England to J. R., at Montreal, to be invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company as follows:—"J. Rose, in trust," without naming for whom, and paid for it with S.'s money. He sent over the certificates of stock to S., and subsequently paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness, some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends credited by them to J. R. who paid them to S.

J. R. subsequently became insolvent, and S. not receiving her dividends sued the bank for an account.

Held, reversing the judgment of the Court below, Strong, J., dissenting, that there was sufficient to show that J. R. was acting as agent or mandatory of S., and the Bank of Montreal, not having shown that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank.

Kerr, Q.C., for the appellant.
Laflamme, Q.C., and *Robertson, Q.C.*, for the respondents.

THE ATTORNEY-GENERAL OF CANADA v. THE BANK OF MONTREAL.

Municipal taxation—Property leased to and occupied by the Crown.

Held, reversing the judgment of the Court below, that property situated in the City of Montreal, being under lease to the Crown, and occupied by officers and servants of the Crown for public and military purposes, is exempt from municipal taxation by the Corporation of Montreal.

Church, Q.C., for the appellant.
Roy, Q.C., for the respondent.

STANTON v. THE CANADA ATLANTIC RAILWAY COMPANY.

Judgment by Court of Appeal quashing interim injunction—Not appealable.

In this case, on the 1st of September, 1883, Mr. Justice Torrance of the Superior Court for Lower Canada ordered the issue of a writ of injunction returnable on the 30th day of October then next, enjoining the respondents and certain other persons named from issuing or dealing with certain bonds until otherwise ordered by the said Judge of the Court.

About the 13th of November, 1883, the C. A. R. Co. presented a motion to quash the injunction. On the 13th of December following Mr. Justice Matthieu of the Superior Court declared that the said writ of injunction had been issued without reason (*sans cause*) and suspended it until the final adjudication of the action on the merits.

Both the appellants and respondents appealed from this judgment to the Court of Queen's Bench (appeal side), which Court, on the 21st of January last, rendered judgment, quashing the injunction absolutely.

On the 9th of February following, the appellants gave notice of their intention to appeal to the Supreme Court of Canada, and on the 19th of February presented a petition to Mr. Justice Monk, one of the Judges of the Court of Queen's Bench, for the allowance of the appeal.

On the 20th February, Mr. Justice Monk rendered judgment, refusing to allow the appeal on the ground that the judgment quashing the writ of injunction was not a final judgment, although the security offered was sufficient.

On the 27th of February last, the appellants by their attorneys served notice of their intention to move before a Judge of this Court, to be allowed to give proper security to the satisfaction of this Court, or of a Judge thereof, for the prosecution of their appeal, and to appeal to this Court, notwithstanding the refusal of the Court below to accept said security, and notwithstanding the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal.

This motion came before Mr. Justice Henry in Chambers on the 5th of March, who enlarged it into Court, and it was on the same day argued at length before the Court.

Held, that the judgment of the Court of Queen's Bench (appeal side) quashing the interim injunction, was not appealable.

Church, *Q.C.*, and *Ferguson*, for the appellants.

Durham, *Q.C.*, and *Gormully*, for the respondents.

NEW BRUNSWICK.]

MACDONNELL v. McMASTER.

Deed executed, sealed, and registered, effect of—Rev. Stats. N. B. (4th series) cap. 96, sec. 33—Certified Copy of Deed—Admissibility of, in evidence.

In an action of ejectment brought against the respondents, the appellants claimed title from H. McM., who conveyed to his son R. McM., by deed dated 16th June 1856. On 19th April, 1869, R. McM. and wife, mortgaged their interest in the land to the appellants, and this mortgage was subsequently foreclosed, and the land sold and purchased by P. S., who received a sheriff's title. H. McM., defendant in possession, by his plea claimed that he was tenant in common of the premises.

The deed was signed and sealed by H. McM. before two subscribing witnesses and was subsequently registered by one of these witnesses, another son of H. McM.

At the trial, in the absence of the original deed, a copy of the deed certified by the registrar of deeds was put in without objection as to the insufficiency of the affidavit required by the statute. There was no evidence of an actual delivery of the original deed by H. McM. to R. McM.

Held, that when the deed was executed and placed on record, H. McM. parted with all control over the deed and vested the land in the grantee, and the respondent was estopped from denying the due execution of the deed to R. McM.

Held, also, that the deed being admitted to have been registered and a copy of the same admitted at the trial without objection, it was too late now to object to the admissibility of the copy.

Chrysler, for the appellants.

C. H. Tupper, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[13TH OCTOBER, 1885.

WHITING v. HOVEY.

Interpleader issue—Judgment at trial—Appeal.

On a motion to quash an appeal to this Court from the judgment of Ferguson, J., at the trial of an interpleader issue 9, Ont. R. 314, upon the ground that such a decision is merely interlocutory and not appealable, the Court was equally divided and the motion was therefore dismissed.

Robinson, Q.C., and *W. M. Hall*, for the motion.

McMichael, Q.C., contra.

Q. B. D.] [8TH SEPTEMBER, 1885.

SCRIBNER v. KINLOCH.

Sale of goods—Vendor employed as clerk—Change of possession—Chattel Mortgage Act.

The Court being equally divided, the judgment of the Court below, 2 Ont. R. 265, was affirmed.

McCarthy, Q.C., Hector Cameron, Q.C., Dougall, Q.C., and *McPhillips*, for the appellants.

S. Smith, Q.C., J. K. Kerr, Q.C., and *Holman*, for the respondents.

Q. B. D.] [15TH SEPTEMBER, 1885.

HENDRIE v. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

The judgment of the Court below, 3 Ont. R. 603, was affirmed.

Edward Martin, Q.C., for the appellant.

McCarthy, Q.C., for the respondent.

Q. B. D.] [13TH OCTOBER, 1885.

HATELY v. MERCHANTS' DESPATCH CO.

Common Carrier—Bill of lading—Negligence—Liability—Condition.

The judgment of the Queen's Bench Division, 4 Ont. R. 723, as to the defendants the Great Western Railway Company was reversed, and the action was dismissed as against these defendants, costs being reserved.

The judgment of Osler, J. A., at the trial, 4 Ont. R. 723, was affirmed as against the defendants the Merchants' Despatch Company.

C. Millar, for the Merchants' Despatch Co.

Moss, Q.C., and *Aylesworth*, for the plaintiffs.

Osler, Q.C., for the G. W. S. S. Co.

Cassels, Q.C., and *Holman*, for the G. W. R. Co.

C. P. D.] [13TH OCTOBER, 1885.

MOFFATT v. SCRATCH.

Disclaimer—Grant from Crown—Surrender—Tax sale—Surveyor-General's return.

The judgment of the Court below, 8 Ont. R. 147, was affirmed, Patterson, J.A., dissenting.

J. H. Ferguson, for the appellant.

Falconbridge, and *T. M. Morton*, for the respondent.

WILSON, C. J.] [13TH OCTOBER, 1885.

BEATTY v. NEELON.

Misrepresentation—Action of deceit—Parties.

Held, reversing the judgment of Wilson, C. J., 9 Ont. R. 385, upon the facts there stated, that the unsatisfactory nature of the evidence, the long delay, the conduct of the parties, and their dealings with the matters in dispute, disentitled the plaintiffs to relief.

Per Hagarty, C.J.O. The damage claimed was not for inducing the plaintiffs to enter into a partnership or Company, but for the injury sustained in the Company by the misrepresentation of the defendants, a damage resulting to all the shareholders; and therefore the action should have been by the Company.

Per Burton, J.A. This was a common law action for deceit, and if maintainable at all, was maintainable only by the plaintiffs to whom the alleged misrepresentations were made.

Robinson, Q.C., *Cassels, Q.C.*, and *R. Gregory Cox*, for the appellants.

McCarthy, Q.C., and *J. H. Macdonald*, for the respondents.

OSLER, J.A.] [14TH SEPTEMBER, 1885.

DOUGLAS v. HUTCHINSON.

Married Woman—Dower—Separate estate.

The defendant's first husband died in 1870, and she married again in 1871. This action was brought before the Married Women's Property Act, 1884, was passed.

Held, reversing the judgment of Osler, J.A., 6 Ont. R. 581, that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but fell within the provisions of R. S. O. cap. 125, sec. 3, and was not liable to be sold under execution to satisfy the plaintiff's judgment.

Per Patterson, J.A.—*Quære*, whether a *fi. fa.* is the appropriate remedy for reaching the separate estate of a married woman.

W. H. P. Clement, for the appellant.
J. J. Maclaren, for the respondent.

FERGUSON, J.] [15TH SEPTEMBER, 1885.

BELL v. FRASER.

Secured creditor—Principal and agent—Loss by agent—Liability of secured creditor for agent's loss—Defence—Payment into court—Defendant succeeding—Right to return of money paid in.

The plaintiff, as assignee of an insolvent debtor, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits held by him as security, and payment of any balance found against him. The timber had been placed in the hands of K. & Co., for sale.

Held, upon the facts stated (affirming the judgment of Ferguson, J.) that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them.

The defendant, in his defence, averred that if the Court should be of opinion that he was liable for payment of the balance claimed, he brought into Court the sum of $4,300 saying that the same was sufficient to pay in full all claims of the plaintiff, etc., and under this defence paid the money into Court. The plaintiff withdrew the money after issue and before trial.

Ferguson, J., though holding that the plaintiff could not recover, refused to order him to refund the $4,300.

The Court being equally divided on this point, the judgment of Ferguson, J., was affirmed.

Per Hagarty, C.J.O., and Osler, J.A. The only way in which the money could have been paid into Court was under order 26, unless by special order of the Court. The money was not paid in conditionally, but absolutely in satisfaction of the plaintiff's claim, as an alternative defence, and therefore it was properly withdrawn by the plaintiff.

Per Burton and Patterson, JJ.A. The defence of payment into Court set up was not strictly pleadable, but was a notice to the plaintiff that the money was in Court to answer his demand if he established it. Money paid into Court under a defence is not inevitably to be regarded as paid in under order 26. The inference that payment into Court is made for immediate satisfaction must yield to a direct notice that it is not made for that purpose, and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff.

McCarthy, Q.C., for the appellant.
Gormully, for the respondent.

C. C. PERTH.] [18TH OCTOBER, 1885.

PORTEOUS v. MYERS.

Creditors' Relief Act, 1880—Distribution—Costs of first execution.

Held, affirming the judgment of the Court below, that the creditor under whose execution an amount was levied which is sought to be disturbed under the Creditors' Relief Act, 1880, was not entitled to priority of payment of the costs of his action.

Moss, Q. C, for the appellant.

J. P. Woods, for the respondents.

C. A.]

KENNEY v. McKENZIE.

Party wall—Agreement to pay for—Right under covenant.

C. and the defendant were owners of adjacent lots, and C., being about to build on his lot, agreed to erect a party wall on the dividing line and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever the defendant should require to use it. Subsequently, C. sold and conveyed his lot to plaintiff's wife by deed containing the usual statutory covenants. Some years later, the defendant erected a building on his , making use of the rear part of such party wall, by reason of which he became liable to pay $98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in the land against the defendant, to recover the sum so due in respect of such wall,

Held, that the payment by the defendant to C. was proper, and that the plaintiffs were not entitled, as vendees of C., to insist on payment, the right to payment of the sum stipulated to be paid for the wall not having passed by the conveyance by C. to the plaintiffs.

Aylesworth, for the appellant.

Lash, Q.C., for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C. J.

BANK OF HAMILTON v. HARVEY.

Non-negotiable promissory note—Right to recover—Pleading.

The statement of claim alleged that the defendant, being a director of a company, jointly with three others made a promissory note payable to the said company, with the intent that it should be used by the company upon the credit of the makers for the purposes of the company, and that the company indemnified the makers against liability thereon; that the plaintiffs discounted the note for the company, and with the knowledge and consent of the defendant, paid the proceeds to the company; that the money was applied to the purposes of the company; and that after default in payment the defendant gave security to the plaintiffs against his liability upon the note.

Held, on demurrer, that the statement of claim was good, and that the plaintiffs were entitled to recover against the defendant upon the note, although the latter was not a negotiable instrument.

Muir, for the demurrer.

E. Martin, Q. C., contra.

[O'CONNOR, J.

REGINA v. NEWTON.

Conviction for keeping house of ill-fame—32-33 Vict. cap. 32—Forfeiture of fine—Further imprisonment.

The defendant was convicted in proceedings taken under 32-33 Vict. cap. 32, and not under 32-33 Vict. cap. 28, for keeping a house of ill-fame, but the conviction did not "adjudge" any imprisonment, or any forfeiture of the fine imposed.

Held, bad.

The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to pay within said period to the said

magistrate the sum of $100 without costs, to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months.

Held, bad, for uncertainty in requiring the fine to be paid to the magistrate personally, instead of to the gaoler.

Aylesworth, for the motion.
Capreol, for the crown.

REGINA v. RICHARDSON.

Criminal law—Conviction—Award of further imprisonment.

A conviction for keeping a house of ill-fame, after adjudging a penalty by fine and imprisonment, awarded further imprisonment in default of sufficient distress or of non-payment of the fine.

Held, bad.

Held, also, that this was not a mere formal defect within sec. 80 of 32-33 Vict. cap. 32 (D.)

Held, also, that the effect of sec. 28 was not to take away the writ of certiorari.

Osler, Q. C., for the motion.
J. G. Scott, Q. C., for the Crown.

In re CLARK v. THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Drainage by-law—46 Vict. cap. 18, sec. 588, (O.)—Validity of by-law—Costs.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation, is invalid.

A by-law, therefore, defining the duties of inspectors of drains, and enacting, (1) that obstructions wilfully placed in drains should be removed by the parties placing them there, or at their expense, without regard to whether such parties owned the lands through or between

which such drains were situate; (2) that if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so; (3) that if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the party chargeable, instead of only against the party himself; and making no provision for appeal against such charging of such cost upon the collector's roll, was quashed with costs.

Aylesworth, for the motion.
Pegley, contra.

CHANCERY DIVISION.

[BOYD, C., 14TH OCTOBER, 1885.

BURNS v. MACKAY.

Fraudulent preference—Necessity of intent to defraud on both sides.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor under R. S. O. cap. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor; and the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion.

Ivey v. *Knox*, 8 Ont. R. 648, declared to be over-ruled.
Gibbons, for the plaintiff.
Meredith and *Mulkern*, for several defendants.

[BOYD, C., 14TH OCTOBER, 1885.

EASTMAN v. THE BANK OF MONTREAL.

Assignment for creditors—Proof of claims—Collateral securities—Giving credits for amounts received on collaterals.

F. agreed with the Bank of Montreal for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted and which he indorsed and delivered to the Bank. He also arranged with

the Merchants' Bank to discount his notes, to be secured by the deposit of his customers' notes as collaterals. F. then failed, being largely indebted to both Banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee the Banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor on behalf of himself and all other creditors entitled to share under the assignment against the Banks and the assignee, it was

Held, following *Rhodes* v. *Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt and to take a dividend upon the whole without prejudice to his rights under securities he may hold, subject of course to this qualification that he must not ultimately receive more than the full amount of his claim. To hold otherwise, would be virtually to deprive the secured creditor of any advantage from his security. The state of the accounts at the time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee as at that date; any moneys received prior to that from collaterals are to be credited; those received after from such sources need not be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cents on the $.

Held, also, that substantially both Banks were in the same position as to the securities in their hands.

Held, also, that there was a distinct contract for a line of credit to the debtor by the Bank of Montreal and as long as that line was not exceeded the bank could prove on the footing of that contract as the original debt, and hold the customers' notes discounted in pursuance of that contract as securities.

Meredith, *Q.C.*, for the plaintiff.
Street, *Q.C.*, for the Bank of Montreal.
Gibbons, for the Merchants' Bank of Canada.
Moorehead, for the assignee.

[BOYD, C., 21ST OCTOBER, 1885.

SNARR v. BADENACH.

Annuity—Interest on—As against assignee in insolvency of covenantor to pay annuity—Repairs—Covenant to keep houses suitable for tenants.

J. S. by his will gave his wife E. S. an annuity of $2,000 a year, and charged it on his estate. After his death E. S., the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S, two sons, entered into an agreement whereby the annuity was charged on certain

real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons subject to the said charge. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which she devised all her estate to C. E. S. and M. A. S., the two daughters. C. E. S. and M. A. S. brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity, which was referred to the Master, who found that they had the right to maintain the action and settled the amount of the annuity due at $8,998.95, on which he allowed interest for the six years preceding action brought, at $1738.05

Held, on appeal from the Master's report, that R. S. O. cap. 50, secs. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate, and following *Booth* v. *Boulton*, 2 Giff. 520, except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. And in this case no interest should be allowed as against the estate and other creditors. Even if the statute justified the giving of interest as between the parties to the contract, the awarding of interest could not be upheld as against the assignee in insolvency, the general rule being that interest ceases at the date of the assignment upon all debts where interest is not part of the contract, unless it is evident that there is a surplus to be returned to the debtor.

Held, also, that the expense of some flooring, lathing and plastering was properly charged against the defendant, as the sons W. A. S. and G. E. S. had covenanted to keep the houses reasonably and sufficiently tenantable and suitable for the occupation of tenants taking the same, and these repairs were made because the tenants threatened to leave.

Held, also, on the evidence in this case that the Master was right in disallowing a large set-off brought in by the defendant over and above the sum of $16,000 allowed for reconstructing the buildings.

W. A. Reeve, and *G. F. Ruttan*, for the appeal.
J. C. Hamilton and *Allan Cassels*, contra.

[28TH OCTOBER, 1885.

In Re HONSBERGER; HONSBERGER v. KRATZ.

Interest against executors—Gradation according to conduct—Costs—Allowance on moneys received pendente lite.

The rules developed by the English cases regulating the award of interest against executors and trustees appear to be as follows: (i) When money is kept in the executor's hands without sufficient excuse the offence is deemed an act of negligence, and the usual court rate will be charged at 4 per cent.; (ii) When the executors are not only negligent, but commit an act of misfeasance by expending the funds for their own benefit, or in any other way use them, the higher rate of 5 per cent. will be charged; and (iii) if the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest had been made out of the money, as for instance if it is employed in ordinary trade or in speculation, the beneficiaries will be allowed the option of either having an account of the profits, or having the accounts taken with rests. This gradation may be approximated here (1) by charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of six per cent; (2) by charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) by charging him who makes gain out of his trust by embarking the money in speculation or trading adventures with the profits or with compound interest, as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to show what was the current rate of interest during that period; but the notes and mortgages held by the executors bore interest for the most part at 6 per cent.

Held, on appeal from the Master's report, that interest should be charged at the rate of 6 per cent. yearly; that the awarding of compound interest is opposed to the spirit of the decision in *Inglis* v. *Beatty*, 2 App. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors.

The executors should get costs because the action was not occasioned by their misconduct; but they should not get the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

The taking of administration proceedings does not deprive them of their functions as executors or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*.

Hoyles and Ingersoll, for the plaintiff.

W. H. P. Clement and Collier, for the defendants, the executors.

McClive, for the widow.

[FERGUSON, J., 5TH SEPTEMBER, 1885.

In re ANDREWS.

Trustee for infants—Insurance moneys—Security—47 Vict. cap. 20 (Ont.)

An application upon petition for the appointment of the petitioner as trustee to receive the shares of infants under a policy issued by the Canada Life Assurance Company on the life of one G. W. Andrews, and endorsed in favour of his children, two of them being minors.

The petition set out that letters of guardianship had been issued to the petitioner, one A. S. Wilcox, by the proper court of Dakota, U. S. A.; and an affidavit was filed showing his fitness.

C. L. Ferguson, for the infants, said that they were willing that their guardian should be appointed a trustee. He had given proper security in a foreign court. This case was distinguishable from *Re Thin*, 10 P. R. 490, where no security had been given. The object of the statute is to enable the Company to pay and discharge the claim by payment to a trustee appointed by this Court. It appeared that "there was no one competent in this Province" to receive the share of the infants. The Insurance Company required that the order should provide that payment to the trustee should be sufficient discharge to the Company, and that the costs should come out of the fund.

Warren F. Burton, for the Insurance Company.

FERGUSON, J., said, that upon satisfactory evidence being furnished that the petitioner had given substantial security on his appointment as guardian in Dakota, he would declare him to be a fit and proper person

to be appointed trustee for the purpose of receiving the shares of the infants herein without giving further security.

Subsequently, affidavits were filed showing that substantial security had been given in Dakota according to the practice of that Court, and the order was made.

[FERGUSON, J., 21ST SEPTEMBER, 1885.

MURRAY v. MALLOY.

Will, construction of—Statute of mortmain—Bequest of personalty to charitable institution to build a college.

J. M. died on 7th August, 1884, having made his will five days before, in which after giving certain legacies he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever with the above exceptions, to the Lutheran Church, for the purpose of building a college in Canada and not elsewhere and in his name." The Lutheran Church was not incorporated.

Held, that the devise of the realty, and all personalty savouring of the realty, was bad.

Held, also, following *Giblett* v. *Hobson*, 3 M. & K. 517, that the bequest of the pure personalty was also bad; that a bequest of money or other personalty to any charitable institution to build or erect buildings taken by itself, is within the statute of mortmain, and that the *onus* of showing that the intention of a testator was restricted within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in mortmain must be pointed out as the site for the building, or the words of the will must expressly exclude the application of the money given in the acquisition of land, which was not done in this case.

W. N. Miller, for the plaintiffs.
D. Black, for the Lutheran Church.
Middleton, for the executors.

In re CROWTER; CROWTER v. HENMAN.

Executors—Misappropriation by co-executor.

D. H., an executor under the will of P. S. C., by tacit consent of his co-executors, took the actual management of the estate and received all the moneys arising from it, including the purchase money of certain of the real estate sold pursuant to the will, and misappropriated the latter.

Held, that a co-executrix who had joined in the conveyance to the purchase but who was not proved to have known that there was a balance of the purchase money in the hands of D. H. after the purposes of the will had been satisfied, viz: by payment of debts and incumbrances, or that he was misappropriating in any way, was not liable to make good the moneys so misappropriated by D. H.

Held, also, that even if she had been liable for the principal of such moneys, she would not have been liable for the interest, as the money never came into her hands at all.

McCarter v. *McCarter*, 7 Ont. R. 243, distinguished.

Moss, Q. C., for the appellant.

J. Kerr, for the respondents.

IN CHAMBERS.

[WILSON, C. J., 12TH OCTOBER, 1885.

WALLER v. CLARIS.

Notice of motion—Irregularity—Costs of attending to object.

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective,

Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular.

Hoyles, for the plaintiff.

F. E. Hodgins, for the defendants.

[BOYD, C., 14TH OCTOBER. 1855.

ROGERS v. LOOS.

Retaining money paid into court.

The statement of defence set up that the assault complained of was in self defence; and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into Court $150, and said that the same was sufficient, etc.

Held, affirming the order of Kingsmill, Local Judge, that the money paid into Court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs.

W. H. P. Clement, for the defendant.
Hoyles, for the plaintiff.

ORPEN v. KERR.

Examination of party under Rule 285—Production of documents—Special examiner—Rule 285—G. O. 147.

The powers of a special examiner under G. O. 147, as to directing the production of documents, extend to examinations under Rule 285.

Upon an examination of a party under Rule 285, at a stage of th action earlier than an examination will be ordered as of course, only material documents should be produced, such as would be produced in the ordinary course at a later stage.

A. H. Meyers, for the plaintiff.
C. H. Ritchie, for the defendant.

[BOYD, C., 26TH OCTOBER, 1885.

SERVOS v, SERVOS.

Changing place of trial—Preponderance of convenience.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided: but the plaintiff

proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton was estimated by the defendant at between $50 and $75, and by the plaintiff at about $30.

Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed unless the plaintiffs at once paid into Court $40 to meet the defendants' additional expense.

Holman, for the plaintiff.
Shepley, for the defendant.

BOYD, C.]

[BOYD, C., 4TH NOVEMBER, 1885.

SNIDER v. SNIDER.

SNIDER v. ORR.

Alimony and fraudulent conveyance—Separate actions—Costs—Taxation—Rules 447-9 – Local officer—Revision—Special circumstances—Pleading and demurring—Striking out—Embarrassment — Technical applications Interim alimony—Disbursements—Desertion—Offer to receive wife back—Multiplication of orders.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in an action; and therefore, where separate actions were brought for such claims, and separate orders to the same effect were made as to the same defendant in both actions, the plaintiff was allowed the costs of only one order.

Rules 447-449 are not necessarily applicable to a taxation had under 48 Vict. cap. 13, sec. 22; and where upon a taxation by a local officer these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered the Court thinking the bill so exorbitant as to show special circumstances.

A paragraph of the defence submitted that "the plaintiff had made out no case entitling her to relief." This was struck out by a local Master on the ground that it transgressed Rule 193.

Held, that this was neither scandalous nor prejudicial, nor embarrassing under Rule 178, but was a mere reference to section 44 of the Judicature Act, and should not have been struck out.

The modern practice is to discourage applications merely technical and unmeritorious and, even if successful, not to reward them by exemplary costs.

Held, that a wife was not entitled to *interim* alimony and disbursements, where she sued on the ground of desertion, not alleging cruelty, and where the husband offered by his defence and on oath by affidavit to resume cohabitation with her.

Remarks upon the multiplication of orders and summonses in action.

Shepley, for the defendant.
E. Douglas Armour, for the plaintiff.

[PROUDFOOT, J., 9TH NOVEMBER, 1885.

LALONDE v. LALONDE.

Interim alimony—Desertion—Occupation of homestead by wife—Interim disbursements—Counsel fee—Solicitor as counsel.

An order of a Local Master directing the defendant in an alimony action based upon desertion to pay *interim* alimony, was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of *interim* alimony, and the defendant not showing that she was in receipt of any income from the farm.

An order directing the defendant to pay forthwith *interim* disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor who intended to act as counsel at the trial. *Magurn* v. *Magurn*, 10 P. R. 570, not followed in this respect.

Holman, for the appeal.

E. Douglas Armour, contra.

[FERGUSON, J., 30TH JUNE, 1885.

In re RYAN.

Toronto agents—Lien on fund in Court.

The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in Court to the credit of this matter to which the solicitor was entitled for his costs, to the extent of their unpaid agency bill of charges in this matter; and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor.

Holman, for a creditor.

W. A. Foster, for the Toronto agents.

[FERGUSON, J., 21ST SEPTEMBER, 1885.

BARBER v. BARBER.

Purchaser—Compensation—Vesting order—Advertisement.

The advertisement of a judicial sale stated that the property was in possession of a tenant who would give the purchaser possession on the 1st of November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November, the purchaser obtained a vesting order.

Held, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation on account of which it was to be assumed that the purchase money was greater.

Hoyles, for the purchaser.

Holman, for the vendor.

[FERGUSON, J., 1st OCTOBER, 1885.

JAMIESON v. PRINCE ALBERT COLONIZATION CO.

Order to produce—Order refusing to rescind—Appeal from—Rule 427.

An *ex parte* order for the production of documents was made by the Local Master at Belleville, on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order.

Held, that the appeal was in effect an appeal from the original order, as the result, if the appeal were successful, would be to rescind that order, and the appeal was therefore dismissed as too late under Rule 427.

Arnoldi, for the appeal.
Hoyles, contra.

[FERGUSON, J., 5TH OCTOBER, 1885.

BEATTY v. HALDAN.

Solicitor and client—Costs—One city solicitor doing work for another on agency terms.

In a suit of *Wilson* v. *Wilson*, D. acted generally as solicitor for H. who had been appointed administrator *pendente lite*. In certain matters in connection with the suit, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect of these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges, of which he rendered D. an account. D. made up one bill of costs and rendered it to H., which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill containing these charges to D.

Held, that the Master in taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction.

Moss, Q. C., for the appellant Haldan.
O'Donohoe, Q. C., for the plaintiffs.

[THE MASTER IN CHAMBERS, 1st OCTOBER, 1885.

BOUGHTON v. THE CITIZENS' INSURANCE CO.

Production of documents—Privilege—Letters containing references to solicitors' advice.

Letters, written to the defendant company at Montreal by a clerk who was sent to Toronto to investigate the plaintiff's accounts and who, on his reporting, was instructed to take the advice of the company's solicitors,

and if they approved, to have the plaintiff arrested, which letters were sworn to have been written in anticipation of litigation, after consultation with the solicitors, and to contain references to their advice, were held privileged from production.

Semble, that a party cannot make a second application for a better affidavit on production, when he did not on the first application object to the non-production of the documents he seeks to have produced on the second.

George Macdonald, for the plaintiff.
Rae, for the defendants.

[2ND OCTOBER, 1885.

BRYCE v. SALT.

Judgment—Indian—C. S. C. cap. 9—Indian Act, 1880.

An order was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve.

Held, that, since the repeal of C. S. C. cap. 9, there is nothing to prevent an Indian suing and being sued; although by the Indian Act of 1880, sec. 77, the judgment will not bind any property of the Indian except that described in section 75, (*a*)

Urquhart, for the plaintiffs.
Holman, for the defendant.

(*a*) In *Black* v. *Kennedy*, Man. Rep. temp. Wood, 144, Wood, C.J., held that a mortgage made by an Indian living on a reserve of land in the reserve was void; that judgment in ejectment thereon was also void; and that a sheriff was not bound to execute a writ issued on such a judgment.—ED. C. L. T.

[THE MASTER IN CHAMBERS, 12TH OCTOBER, 1885.

PEEL v. WHITE.

Limited defence—Appearance—Statement of claim—Rule 68.

The defendant entered an appearance under Rule 68, limiting his defence to one item in the particulars endorsed on the writ of summons.

Held, that, after such appearance, a statement of claim was unnecessary, and a judgment signed upon a statement of claim, for default of a statement of defence, was set aside, with costs.

McPhillips, for the plaintiff.
Hoyles, for the defendant.

[THE MASTER IN CHAMBERS, 10TH NOVEMBER, 1885.

WALMSLEY v. GRIFFITH.

Security for costs—Co-defendant—Counter claim.

A defendant asking relief against his co-defendant will not be ordered to give security for costs.

Semble. Such relief should not be asked by way of counter claim.

J. R. Roaf, for the defendant Webster.

Echlin, for the defendant Hall.

NEW BRUNSWICK.

In the Supreme Court.

BYRNE v. ARNOLD.

Justices of the Peace—"Absence" of, within meaning of sec. 105 of The Canada Temperance Act—Summons to witness—Who may issue—Conviction made by Justices acting without jurisdiction, but having jurisdiction over the subject-matter—Justification to Justices for anything done under it.

A prosecution under The Canada Temperance Act was commenced by two Justices, A. and B., and a summons issued. On the return of the summons, another Justice of the County, on the application of the defendant, issued a summons for A. and B. to give evidence for the defendant on the hearing; whereupon two other Justices, at the request of A. and B., under the provisions of sec. 105 of the Act, heard the case and convicted the defendant.

Held, per Allen, C.J., Weldon, Palmer and Fraser, JJ., King, J., contra., that the word "absence" in section 105 did not necessarily mean actual absence from the place of trial; but would apply to a case where the original Justices had for some cause become incapable of acting on the hearing.

Per Allen, C.J., Weldon, King and Fraser, JJ. Under section 16 of The Summary Convictions Act only a Justice before whom the case is to be heard has authority to issue a summons for a witness; therefore A. and B. were not legally summoned as witnesses, and were not "*absent*" within the meaning of the Act; and the other Justices acted without jurisdiction.

Per Palmer, J., A. and B. having been summoned as witnesses at the request of the defendant, he could not object that they were not legally summoned.

Held, also, King, J., *dubitante*, that as the convicting Justices had jurisdiction over the subject-matter of the complaint, and the conviction was good on its face, it was a justification for them, until set aside, for anything done under it.

PETERS v. WATERBURY.

Promissory Note—Accommodation Paper—Liability of Indorsee to pay under agreement with Payee—Extinguishment of debt.

A. being indebted to the plaintiff and other persons, gave the plaintiff a bill of sale of his goods, the plaintiff agreeing to pay A.'s borrowed money and accommodation notes. Among the accommodation notes was one made by the defendant in favour of A., who indorsed it to the plaintiff, without notice that it was an accommodation note. The note was discounted by a Bank, and the proceeds received by A., and the plaintiff was obliged to pay it at maturity. In an action by the plaintiff to recover the amount of the note,

Held (i), that as it was one of the conditions on which A. gave the bill of sale, that the plaintiff should pay his (A.'s) accommodation notes, he could not recover in the action, as his payment of the note in pursuance of his agreement was an extinguishment of the debt, though he did not know that it was an accommodation note; (ii), that though the plaintiff's agreement to pay the accommodation notes was made with A., the defendant could avail himself of it as a defence to an action on the notes.

Ex parte BOIS.

Practice—Affidavits used on obtaining rule nisi—Defect in—Objecting to.

If an affidavit on which a rule *nisi* was granted is defective in not stating the deponent's addition, it may be objected to by the opposite party on shewing cause.

GOOD v. MERRITHEW.

Costs—Action in Supreme Court—Amount recovered within jurisdiction o County Court—45 Vict. cap. 9, sec. 7 (N.B.)

If in an action in the Supreme Court, the plaintiff recovers an amount within the jurisdiction of the County Court, the costs of the proceedings are to be taxed under the Act 45 Vict. cap. 9, (N. B.), according to the scale of fees in County Courts, and not County Court costs only.

THE MARITIME WAREHOUSING AND DOCK CO. & THE MARITIME BANK OF CANADA v. NICHOLSON.

Consolidation of mortgages—Registry Act—Judgment creditor—Tender of interest and costs after commencement of foreclosure suit—Amendment of bill on appeal.

The plaintiff agreed with D., as agent of the defendants, to lend them $25,000, to be secured by mortgage on two adjoining lots of land. The defendants required the money for the purpose of erecting a warehouse which was to cover the principal part of both lots. At the time of the agreement, the title to one of the lots was in the defendants, and they executed a mortgage to the plaintiff of that lot, to secure the payment of $15,000 and interest. The title to the other lot was in D. who held it as trustee of the defendants, and he, in pursuance of the arrangement, also executed a mortgage of it to the plaintiff for $10,000—the balance of the sum agreed to be loaned, and gave the plaintiff his bond for $10,000, and interest. Immediately after giving this mortgage, D. conveyed to the defendants his equity of redemption in the lot. The interest on both mortgages being in arrear, the plaintiff brought a suit for their foreclosure; after which the defendants tendered the interest due on the $15,000 mortgage, and the costs of the suit, and claimed that that mortgage should not be foreclosed.

Held, that as the whole sum secured was the debt of the defendants, the mortgage given by D. was, in effect, their mortgage, and they could not redeem their own mortgage without also paying the mortgage given by D.

When a mortgage becomes forfeited by non-payment of the interest, and a suit for foreclosure is brought, the suit can only be terminated by payment of the principal, interest, and costs, under Consol. Stat. cap. 49, sec. 111; and in such a case, a tender of the interest due, and costs of the suit is of no avail.

The lien of a judgment creditor of a mortgagor, subsequent to the mortgage, is subject to the pre-existing security of the mortgagee, and can only attach upon any surplus that may remain after the mortgage is satisfied.

In a suit to foreclose two mortgages given to the plaintiff, one by the defendant and the other by D., who afterwards conveyed his equity of redemption to the defendant, it was objected by the answer that the plaintiff could not consolidate the mortgages because they were given by different persons. Evidence was then received on the part of the plaintiff to shew that the two mortgages were one transaction, and were given to secure a loan to the defendant, for whose benefit D. held the property mortgaged by him, in trust.

Held, on appeal, that such evidence should not have been received without amending the bill, and alleging facts to warrant its admission; but that such amendment might be made on hearing the appeal.

BARBOUR ET AL. v. AUSTIN J. ROBERTS.

Bill of Exchange—Settlement of by note of third party—Satisfaction and discharge of bill—Writing given on receipt of—Accord and satisfaction—Parol evidence—Motion for new trial on ground not taken on trial—Commission for examination of witnesses—Return—Commissioner's oath—Interrogatories—Answer extending to matters not inquired of—Suppression of.

The defendant having drawn a bill of exchange in favour of the plaintiff which was dishonoured, R. gave his note to the plaintiff for the amount of the bill and interest, payable in three months, and the plaintiff made out an account in which the bill and interest were charged on the debit side, and R.'s note credited, balancing the account; under which was written "Settled as above," and signed by the plaintiff; under this was written "The above note not to be renewed if required by Mr. R."

In an action against the defendant as drawer of the bill he pleaded accord and satisfaction, and gave evidence by R., without objection, that the plaintiff accepted his note "in full settlement and payment" of the bill. This was denied by the plaintiff, who testified that the note was taken as collateral security for the payment of the bill. A verdict having been found for the defendant on this issue;

Held, per ALLEN, C. J., WELDON, WETMORE and FRASER, J. J. (Palmer, J., dissenting), that the plaintiff not having objected at the trial, could not move for a new trial on the ground that the parol evidence was improperly received, and that the jury should have been directed that the account signed by the plaintiff contained the agreement on which the note was given; and did not amount to satisfaction of the bill.

Semble. The account signed by the plaintiff did not amount to an agreement *inter partes*, but merely to a receipt shewing the manner in which the account was settled, and that parol evidence of the agreement was admissible.

An agreement to accept a note "in full settlement and payment" of a debt, is evidence of accord and satisfaction.

Per Palmer, J. The account signed by the plaintiff contained the agreement between the parties; as it did not show that the note was accepted in satisfaction of the bill, the parol evidence was inadmissible, and the jury should have been directed to find for the plaintiff, though no such contention was made at the trial. The evidence of R. did not prove that his note was taken in satisfaction of the bill.

Observations as to the effect of a general objection to the admissibility of evidence.

On a commission to examine witnesses, if the answer to an interrogatory extends to matters not inquired of, and which the opposite party could not have anticipated, and therefore did not file a cross-interrogatory, the answer will be suppressed.

A commission directed that before proceeding to examine witnesses, the commissioners should take an oath in the form indorsed on the commission. The return stated that the commissioners were severally duly sworn, and that all things were had, done, taken and performed by them as required by the commission.

Held, sufficient.

BUCKLEY v. RUSSELL.

Landlord and tenant —Agreement for a lease, construction of—Demise—Right to distrain.

The plaintiff, being in possession of land belonging to the defendant, and negotiating for a lease, signed a memorandum, which, after describing the property, stated as follows:—"Twenty-five years. $50 a year. Commencing 1st September, 1880." The plaintiff remained in possession more than a year after this; but the parties having disputed about the terms of the lease, it was not executed, and no rent was paid.

Held, that the agreement amounted to an actual demise, at a fixed rent; and that the defendant could distrain.

Ex parte FAWCETT.

Garnishee process—Act 45 Vict. cap. 17—Restrospective operation.

The Act 45 Vict. cap., 7, N. B., providing for garnishee process, applies to judgments recovered as well before as after the passing of the Act.

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MARITIME LAW; NECESSARIES AND REPAIRS.

IN *Smith's* Mercantile Law (*a*), the rights of third parties against an agent are thus stated:—"An agent contracting as such for a known and responsible employer incurs no personal responsibility to third parties. If the individual, with whom he contracted, knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of the principal, and the agent will not be bound. *There is one exception to this rule, viz., the case of masters of ships, who are responsible as well as their owners on contracts for repairs, stores, or loans of money for those purposes;* yet, even in that case, if there be circumstances which show that the owners alone were trusted, they alone will be responsible." We purpose to review the authorities, which are not numerous, upon this subject.

Hoskins v. *Slayton* (*b*), was an action of *indebitatus assumpsit*, for goods sold and delivered. The goods were sails made for the use of a ship, and the evidence was that the defendant, who was master of the ship, ordered the sails, and that the plaintiff knew the owner of the ship, and had previously applied to him to be allowed to make them. The case was tried before Mr. Justice (afterwards C.J.) Lee, and he thus expounded the law:—"In general if the

(*a*) 9th Ed. p. 158.

(*b*) Ca. temp. Hard. 376; decided in 1737.

master orders the goods, both are liable, *the master who gives the order, and upon whose credit the work is done*, and the owners, in respect of the work being done to their property, for if I without having given orders suffer a work to be done for me, I must pay for it. But though both are liable in such a case, yet *if it appears that the credit was given to the owners only*, and that the master in giving orders acted merely as their servant, he will not be liable;" and he directed the jury that, if upon the evidence, they thought no credit was given to the master, but to the owners alone, then they should find for the defendant—which they did.

This judgment does not place the liability of the owner upon the ground taken in recent cases. The later doctrine is that the liability of the owner is governed by the ordinary rules respecting principal and agent, and that in order to render the owner liable on the master's contracts, it must be shewn that he employed the master, that the master was, in fact, his agent (*c*).

It will be observed that the ground of the master's liability is stated to be that the work is done *at his order, and upon his credit*. In *Rich* v. *Coe* (*d*), a case decided by Lord Mansfield in 1777, and frequently referred to in later cases, it is said: "Whoever supplies a ship with necessaries has a treble security; 1. the person of the master; 2. the specific ship; 3. the personal security of the owners, whether they know of the supply or not. The master is personally liable *as making the contract*. The owners are liable in consequence of the master's act, *because they choose him*." This statement of the law is open to criticism. It is not true that the creditor has the security of the specific ship. No lien upon the ship for necessaries or repairs exists at law, except the ordinary possessory lien for repairs in the case of a shipwright, as long as he retains possession of the ship (*e*); and only in certain cases, and to a limited extent, is there a lien for necessaries or repairs enforceable in the Maritime Court.

(*c*) *Haun* v. *Roche*, 27 C. P. 142; *Nelson* v. *Wigle*, 8 Ont. R. 82.
(*d*) Cowper, 636.
(*e*) *Williams & Bruce*, Adm. Pr. 155.

The reason of the owners' liability on the master's contracts, "because they choose him," is, however, the one now accepted. But the absolute statement that the merchant *has for security* "the person of the master," needs qualification, as may be seen from *Hoskins* v. *Slayton*, already referred to. In *Rich* v. *Coe*, the master was lessee of a ship for a term of years under covenants that he should have sole control for his own benefit, and repair at his own expense. The merchant had no notice or knowledge of the lease, and the owners were held liable for necessaries furnished the ship, without their knowledge and without their being known to the merchant. The decision was certainly not in accordance with the principles governing such cases as now understood, for the master could not in any sense be considered the owners' agent (*f*).

In *Farmer* v. *Davis* (*g*), decided in 1786, also by Lord Mansfield, an action was brought against the master for the price of necessaries ordered by the owner, before the appointment of the master, though some were delivered afterwards. The judgment is, "Where a captain contracts for the use of the ship, *the credit is given to him in respect of his contract; it is given to the owners, because the contract is on their account*, and the tradesman has likewise a specific lien on the ship itself. Therefore, in general, the tradesman, who gives that credit, debits both the captain and the owners. Now which is this case? The master made no contract personally. The owners contracted for their ship; *the credit was given to them only;* and there is not a shadow of colour to charge the captain for any part of these goods." The liability of the master is here placed on the same ground as in *Hoskins* v. *Slayton*.

In 1797, in the case of *Westerdale* v. *Dale* (*h*), Lord Kenyon held an owner who sold a vessel, but attempted to convey her to the purchaser by a Bill of Sale invalid under the Merchant Shipping Act, liable for repairs ordered by

(*f*) 1 T. R. 109.

(*g*) See also *Lyman* v. *Bank of U. C.*, 8 U. C. R. 354; *Cloy* v. *Jacques*, 27 U. C. R. 88.

(*h*) 7 T. R. 312.

the purchaser, on the ground that he was still the legal owner. It is needless to say that this harsh and unjust conclusion would not be arrived at in a similar case now. In the course of this judgment a doubt is expressed whether the statement of Lord Mansfield in *Rich* v. *Coe*, respecting the treble security, is not too wide.

In 1808, the case of *Hussey* v. *Christie* (*i*) was sent by the Lord Chancellor for the opinion of the Court of King's Bench, upon the question whether a master has a lien on the ship for money expended by him for repairs. Lord Ellenborough, C.J., said: "If the repairs be done *here* the owners are liable, though the Master may also *become liable on his own contract, if he do not stipulate against his personal liability and confine the credit to his owners.*"

The prior cases we have reviewed shew that in the absence of any such "*stipulation*" by the master, he will not be liable, if the circumstances shew that credit was not in fact given to him.

The liability of the master thus far appears to be based on considerations which do not apply to the ordinary relation of principal and agent.

In *Abbott* on Shipping (*j*), the first edition of which was published in 1802, this liability of the master is expressed to be a special obligation "in favour of commerce." However, in the case of *Priestly* v. *Fernie* (*k*), the proposition that the position of the master entails any special liability, which would not arise, or be deduced from the principles applicable to any ordinary case of agency is directly controverted. This case was an action brought by the consignees, under a bill of lading signed by the master, for non-delivery of the goods. The owners pleaded that the plaintiffs had recovered judgment for the same cause against the master. To this the plaintiffs replied that the master had become bankrupt and the judgments recovered against him remained wholly unsatisfied. Both plea and replication were demurred to. In

(*i*) 9 East, 426, 432; 13 Ves. 694.

(*j*) 11th Ed. p. 101.

(*k*) Citing *Morse* v. *Glue*, 1 Vent. 190, 238; *Priestly* v. *Fernie*, 3 H. & C. 977.

support of the demurrer to the plea, the plaintiff relied upon a passage in *Story* on Agency (*l*), in which it is stated that, though under the Roman law if the creditor elects to proceed against either, he thereby discharges the other, under American law such proceeding does not preclude a second action against the party not sued, "*unless in the first action he has obtained satisfaction of his claim.*" Baron Bramwell, however, in delivering the judgment of the Court, strongly expresses dissent from the view that the liability of a master depends upon any considerations which do not apply to the ordinary relationship of principal and agent. "It is certain," he says, "that the master's liability is founded on the same considerations as that of an ordinary agent, viz., that *he makes the contract in his own name.* But it is said that for purposes of commerce it is convenient that both master and owner should be suable. So it is, but why to the extent contended for more than in any other case of principal and agent? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent." He then animadverts on Lord Mansfield's decision in *Rich* v. *Coe*, and proceeds to argue that neither reason nor authority is in favour of the view that the liability of the master is exceptional.

This case was decided in 1865, and we can find no later English case precisely in point.

In *Pollock* on Contract (*m*), the responsibility of an agent for an existing principal is thus defined:—"In all cases where there is an agent dealing on behalf of a real principal, the intention of the parties determines whether the agent or the principal, or both, are to be liable on the contract and entitled to enforce it. *The question is to whom credit was really given.* And the general rules laid down on the subject furnish only provisional answers, which may be displaced by proof of a contrary intention."

It will be seen that in none of the cases reviewed was it necessary to go beyond the principles stated by Mr. Pollock for the decision of those cases. It would seem that the case

(*l*) 4th Ed., §. 295, p. 397.
(*m*) 2nd Ed. p. 225.

of a ship master is exceptional in this only, that his position affords *prima facie* evidence, in cases where he contracts for the ship in his own name, that *credit has been given to him.*

Reviewing the subject further, it appears from *Priestly* v. *Fernie* (*n*), that suing a master to judgment is conclusive proof of an election to treat him as the party liable, and the judgment operates as a bar to an action against the owner, and that this rule applies to all cases of principal and agent. It also appears that the mere commencement of proceedings, afterwards discontinued before judgment, though possibly evidence is not conclusive evidence of such an election (*o*). Again, it is laid down by Mr. Pollock (*p*), that "the other party may choose to give credit to the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements, or conduct of the party, which lead the principal to believe that the agent only will be held liable, and in the faith of which the principal acts, will have the same result." Conversely, it may be argued that where the merchant so deals with the owner as to shew an intention to hold him alone liable, or so deals with him as to lead the master to believe that the owner alone will be held liable, or where by his laches, or delay, the position of the master is changed so as to make it inequitable to charge him, the owner exclusively would be liable.

The case of *Smith* v. *Irving* (*q*), may also be supported on the ground that by giving time to the owner, it was placed out of the power of the master to pay the claim out of the earnings of the boat for that season, or to take it into account in his settlement with the owner.

We have already referred to the recent authorities, which place the liability of the owner on the same footing as that of any other principal who is sought to be charged on a contract with his agent. It remains for us to consider the

(*n*) 3 H. & C. 977.
(*o*) *Curtis* v. *Williamson*, L. R. 10 Q. B. 57.
(*p*) P. 329.
(*q*) 5 C. L. T. *infra.*

the "specific lien" upon the ship for repairs or necessaries spoken of by Lord Mansfield. It is quite clear, that apart from the statutes, the common law possessory lien of the shipwright, which is coterminous with his possession of the vessel repaired, is the only "specific lien" at law, and that there is at common law no lien whatever for necessaries (*r*). The jurisdiction now exercised *in rem* by the Maritime Court of Ontario in such cases depends upon the Statutes which we shall now refer to. By "The Vice-Admiralty Courts Act, 1863" (*s*), among other matters it is declared that Vice-Admiralty Courts shall have jurisdiction over,—

"(10) Claims for necessaries supplied, in the Possession in which the Court is established, to any ship of which no owner, or part owner, is domiciled within the Possession at the time of the necessaries being supplied;

"(11) Claims in respect of the building, equipping, or repairing within any British Possession of any ship of which no owner, or part owner is domiciled within the Possession at the time of the work being done."

By "The Maritime Jurisdiction Act, 1877" (*t*), by which the Maritime Court of Ontario was constituted, all such jurisdiction was given to that Court, as belongs in similar matters within reach of its process to any existing British Vice-Admiralty Court. By an Act of the last session of the Parliament of Canada, it is declared that "The Maritime Court of Ontario shall have jurisdiction over any claims for the building, or for the equipping, or repairing, with the authority of the managing owner or owners, of any ship to which the jurisdiction of the Court extends under the Act [constituting the Court], or for materials supplied at the instance of such managing owner or owners, for equipping, or repairing such ships, notwithstanding that any owner, or part owner thereof, may have been, or may be domiciled within the said Province at the time of the work being done, or of the materials being supplied."

(*r*) *Williams & Bruce*, Ch. viii.
(*s*) 26 Vict. cap. 24, sec. 10, s-ss. 10 and 11.
(*t*) 40 Vict. cap. 21, sec. 2.

The Act is, however, restricted in its application to claims which may accrue after its passing.

The true effect of these statutory provisions may be gathered from the judgment of the English Court of Appeal in the case of the *Heinrich Bjorn* (*u*), decided on 14th February last (1885), reversing the judgment of Sir J. Hannen (*v*). That was an action *in rem* brought against a foreign vessel for necessaries supplied to a prior owner. The defendants were the subsequent owners, and their liability depended upon the question, whether or not there is a maritime lien for necessaries. It was held that prior to the passing of the Act of 1840, entitled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England" (*w*), no such lien was recognized by the law of England. By the 6th section of the Act referred to, it was enacted, "That the High Court of Admiralty should have jurisdiction to decide all claims . . . for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when . . . the necessaries [were] furnished, in respect of which such claim is made." This provision, the Court held, did not create a maritime lien for necessaries, but merely gave the Court a jurisdiction over such claims, which could be exercised "in the manner familiar to the Court of Admiralty, and to all Courts regulated by the civil law, either by an arrest of the person of the defendant within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question, or any other chattel, or by proceeding against the real property of the defendant within the realm. . . . No right in the ship, or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against *the property of the person who owes the debt* for necessaries, and the arrest

(*u*) L. R. 10 P. D. 44.
(*v*) L. R. 8 P. D. 151.
(*w*) 3 & 4 Vict. cap. 65, sec. 6.

need not be of the ship in question, but may be of any property of the defendant within the realm." The Court also held that the "Admiralty Court Act, 1861" (*x*), which enacts that "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship, elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner, or part owner of the ship, is domiciled in England or Wales—" is to be continued as *in pari materia* with the Act of 1840, and that a maritime lien for necessaries has not been created by either statute.

It will be observed that the terms of the "Vice-Admiralty Courts Act, 1863," already cited, are almost identical with those of the "Admiralty Court Act, 1861," as to necessaries, omitting the words "elsewhere than in the port to which the ship belongs," which do not occur in the latter Act. It is, therefore, clear that there is no maritime lien for necessaries enforceable in the Maritime Court of Ontario, but the same right of proceeding against the person or property of the "*person who owes*" the debt as in the High Court of Admiralty (or rather Admiralty Division of the High Court of Justice). As to repairs, it will be observed that the clause in the "Vice-Admiralty Courts Act, 1863" (*y*), respecting such claims, is in terms identical with the prior clause respecting necessaries. By the "Admiralty Court Act, 1861" (*z*), the jurisdiction of that Court over claims for "building, equipping, or repairing of any ship" is confined to cases where the ship, or its proceeds, are at the time of the institution of the cause under the arrest of the Court. The Dominion Act of last session applies only to repairs, not to necessaries, and in the case of repairs removes the restriction imposed by the domicile of the owner, or part owner, in cases arising after the passing of the Act. The admirable exposition of the nature of

(*x*) 24 Vict. cap. 10, sec. 5.
(*y*) 26 Vict. cap. 24, sec. 10, s-s. 11.
(*z*) 24 Vict. cap. 24, sec. 4.

the jurisdiction and rights created by the Statutes under discussion in *The Heinrich Bjorn* seems to shew that the words contained in this Act referring to the "authority of the managing owner" have no particular force (*a*).

R. GREGORY COX.

(*a*) See also *Williams & Bruce*, Ad. Pr. 157, Note (p).

EDITORIAL REVIEW.

Primitive Judgments.

The *Law Times* mentions a recent case of *Haight* v. *Haight*, in which Mr. Justice Pearson refused to set aside a judgment entered against a defendant for refusal to produce documents for inspection, and entirely apart from the merits of the case.

It appeared that the defendant had put in an affidavit of documents disclosing two deposit books relating to sums of money in a savings bank, the right to which was the question at issue. When an order for inspection of these books was made the defendant refused to allow them to be seen, though her solicitors explained to her in the strongest terms the danger of persisting in her refusal. There was a good *prima facie* defence to the action, but for the refusal to produce the books for inspection an order was made striking out the statement of defence, and judgment was then entered by default. An application was subsequently made on behalf of the defendant to set aside the judgment under Order xxvii, rule 15 (our rule 214) by which "any judgment by default &c. may be set aside by the Court or a Judge upon such terms as to costs, or otherwise, as such Court or Judge may think fit." "Mr. Justice Pearson expressed the great reluctance which he and every other Judge must always feel at dismissing an action on grounds entirely apart from its merits. But he stated that he could find no case in the books in which a judgment had been set aside when it had been obtained under circumstances at all resembling those of the case before him, and he accordingly held that the motion must be dismissed with costs."

Sometimes it happens that "no case can be found in the books" because the principle in question is so plain and so just that the assertion of it does not depend upon precedent. If the hundreds of cases in which judgment by default has been set aside upon terms were reported, the books would not hold them. Here was a case in which a judge had it within his power to inflict punishment upon a defendant for disobedience to the order, and at the same time to put her in a way to have her case tried upon the merits; but the merits are put entirely in the background, and the refusal to open up the case has the effect not merely of punishing the defendant (which would have been proper enough), but it actually gives to the plaintiff a sum of money to which he may be in no way entitled, and the justice of whose claim has never been investigated.

If the rule under which the motion was made was necessary at all, surely it is applicable in a case where there are merits to be tried, and where punishment can be meted out under its terms to a defaulting defendant for his particular default.

To quote Lord Justice Bouverie's words from another column of the *Law Times*, "The object, if correct, is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases;" and "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

The Late Mr. Justice Morrison.

We deeply regret to be called upon to record the death, on the 6th December instant, of the Hon. Mr. Justice Morrison. Although for a considerable time past it has been known that the progress of the disease from which he was suffering was such as to leave no hope of his recovery, the feelings with which the announcement of its fatal termination was received by the profession and the community generally, have been none the less painful.

The deceased judge was born at Belfast, on the 20th August, 1816, and came to Canada when in his 17th year.

His education was begun at the Royal Belfast Institution, and continued at Upper Canada College. Upon leaving college he entered upon the study of the law, and was a fellow student with the late Chancellor Blake, with whom he entered into partnership upon his call to the bar in 1839.

Mr. Morrison entered Parliament in 1848, as member for West York in the third Parliament under the Union, and subsequently represented Niagara. In 1853 he accepted the office of Solicitor-General for Upper Canada, and fulfilled the duties of this office for about six years, during which time he served upon the commission appointed to consolidate the statutes. For two years he held office as Registrar of the City of Toronto, resigning to accept a portfolio in the Cartier-Macdonald Government as Solicitor-General.

His elevation to the bench of the Common Pleas took place in 1862, and shortly after he was transferred to the Queen's Bench. In 1877 he was appointed one of the justices of the Court of Appeal, which position he held at the time of his death. For many years he was Chancellor of the University of Toronto.

As a judge, Mr. Justice Morrison was upright and painstaking. Of late years failing health compelled him to absent himself from many sittings of the Court of which he was a member, and debarred him, in a measure, from participating in its deliberations, and from taking that active part in shaping its judgments he otherwise might have done. But his ripe experience and practical sagacity were recognized by all, and such decisions as he was enabled to render were justly esteemed, by his brethren of the bench and by the bar, entitled to the highest respect.

In private life, the native kindliness of speech and manner, the unfailing geniality and warm-heartedness of the deceased judge endeared him to a wide circle of friends, by each of whom his death will be felt as a personal and irreparable loss.

"Home" Practitioners in Colonial Courts.

Following close upon the case of Mr. De Souza, ante p. 186, comes a case from Queensland, reported in the *Queensland Law Journal* of 1st October, 1885.

An application was made to the Full Court to admit a Scottish law agent as a solicitor of the Court. After reviewing the status of a colonial solicitor in the United Kingdom as compared with that of a "home" solicitor in the colony, the Chief Justice remarks, "Now the standard of education in general and professional knowledge required of our solicitors is at least equal to that prescribed for English solicitors. We see no reason, therefore, for continuing the privileges of unrestricted admission to the solicitors of England and Ireland and the writers of Scotland, or to the solicitors of other colonies, unless our solicitors are placed upon a footing of equality in those countries. We feel that the members of the legal profession in Superior Courts in every country under British rule should be free to practise throughout the Empire; but until we insist on these reciprocal rights we are assured the privileges of the profession in other places will not be extended to the solicitors of this colony. We will allow a reasonable time to elapse and then close our ranks to their solicitors until they open theirs to ours—on equal terms—in other words, until they grant reciprocity of admission. We refuse to admit the applicant."

There is one very important point that is overlooked in considering this question. The law of England is imported into most of her colonies; and as a rule it is only altered by local statutes from time to time. English reports are read and the cases followed in the colonial possessions. English text books are imported and read. The whole foundation of a colonial solicitor's education is in English law. From time to time important English statutes are read by colonial solicitors; and they are to distinguish between English and Colonial law upon the same subject, and state in what respect the former is not the law of the colony. On the other hand an English solicitor, though

well versed in English law, may be totally ignorant of the constitutions of the colonies and their local laws. *Cæteris paribus* then, a colonial solicitor is better qualified to practise in England than an English solicitor to practise in a colony.

Law Stamp Act.

The invalidity of the Law Stamp Act of Manitoba has been determined by the Court of Queen's Bench of that Province.

The *Manitoba Law Journal* says, "Our Court, following the decision of the Privy Council in *Attorney-General* v. *Reed*, has held that the Act relating to law stamps is *ultra vires*. The officials at the Court House, however, acting under the direction of the government, refuse to recognize the validity of the decision—in other words, the officers of a Court refuse to act upon the law laid down by the same Court, confirmed by the Supreme Court and the Privy Council; and the government not only sanctions the proceeding but directs it. The officials excuse themselves on the ground that, if they act as they should, they will be dismissed from office, and the excuse of the government, we suppose, is that they must have revenue. The latter apology would justify burglary. The former is an insult to the government itself."

We quite agree with our contemporary. Who can have respect for law and order if the government of the Province does not lead the way? And how can the bar of the Province respect or defer to the Attorney-General if he defies the Court? As for the officials who refuse to obey the judgment of the Court, they are amenable to the summary jurisdiction of the Court, and their disobedience might be severely punished. If the Court intends its judgments to be respected an example should be made. If an appeal were intended (which, however, would be futile in the face of *Attorney-General* v. *Reed*) it might be proper enough for the government to continue to collect its revenue until the appeal has been disposed of. It is evident that more difficulties are

to arise out of the want of power in the Provinces to levy indirect taxes. The local legislatures should have either more power, or less.

Practising Articled Clerks.

Some enterprising students are either unaware or unmindful of the fact that their mission, while articled, is to serve, not to practise; and that engaging in various money-making pursuits during their clerkship renders them *liable* to be refused admission by the Law Society on passing their final examination.

A correspondent has lately sent us a weekly newspaper in which a student-at-law figures as manager of a branch office of solicitors practising in another place, an insurance agent, and an agent for lending money. In the short editorial items it is announced that he "is about to start a branch law office in M———, and intends visiting that village regularly every week;" and in another column there appears an advertisement for the creditors of a deceased person, under the Revised Statute, which is signed by the same student as "agent for —— —— the above-named administratrix."

We are informed that this is one of a number of cases of a similar kind. Solicitors should understand that they ought not to lend their names to persons unauthorized to practise; and students especially ought to be wary of establishing a reputation for unprofessional conduct. It is a disagreeable thing for the Law Society to be obliged to take up a case of the kind, but in justice to themselves and the profession they will be obliged to do so if the evil continues.

REVIEW OF EXCHANGES.

American Law Register.—June, 1885.

Married Women Traders, by DAVID STEWART. The sources and incidents of a married woman's capacity to trade are discussed. What are earnings in trade, what are the express and implied powers of married women traders, and what partnerships they may form, are among the topics touched upon.

Ibid.—July, 1885.

Employees as Fiduciaries of their Employers, by ADELBERT HAMILTON. "The principle deducible from all the cases is that where a man is employed in anywise on another's behalf, or occupies any fiduciary relation towards such other, no matter how such employment or relation may have arisen or been created, he cannot take to himself any benefit growing out of the subject matter of the employment or relation, whatever may be the manner of the taking. An employee, agent or fiduciary cannot make himself an adverse party to his principal. This is a consequence of the confidential relation subsisting between the parties, and not of the fact that one of them is technically named an agent, or guardian, or attorney, or other well-known designation of trust. The criterion is the relation, not the name." Cases of purchase, lease, etc., by employees are referred to.

Ibid.—August, 1885.

Validity of Bona Fide Voluntary Conveyances by Solvent Debtors, as against Prior Creditors, by BENJAMIN F. REX. English authorities since *Twyne's Case* are first reviewed, and then the American decisions. In many States, as here, the construction of the Statute of Elizabeth is formulated or altered by local Acts.

Ibid.—September, 1885.

The Law of Judicial Notice, by H. CAMPBELL BLACK. Among the classes of facts which are not properly the subject of testimony, and which need not be proved at the trial, the following are noticed. (i) Courts are presumed to know the laws under which they act and which they are to administer. These include public statutes and treaties with foreign nations, as well as proclamations of the executive, government surveys, and

the legal sub-divisions of the public land. (ii) The common law, the general and public statutes, the time when a statute takes effect, and the fact of its repeal; but not private or special Acts of the legislature, nor city ordinances, nor police regulations of municipal corporations. (iii) International law, such as portions of the law merchant, the laws of navigation and law maritime generally, and records of an Admiralty Court properly authenticated under its seal; also, the national flags and seals of all civilized countries; also, the signature and seal of a notary public. (iv) State law in federal Courts. (v) Historical events of such public notoriety that they may be deemed part of the public history of the country. (vi) The course of nature and the rotation of the seasons, as well as the ordinary limitations of human life. (vii) The leading geographical features of the country. (viii) Public general customs and usages. (ix) Matters of political economy and conclusions of science. *How* foreign laws should be proved, is treated at length, and the presumption considered as to foreign law being the same as that administered in the Court.

Ibid.—October, 1885.

Garnishment, by ADELBERT HAMILTON. The subject is treated under the heads, What establishes liability—Who are liable—Indemnity—Service, and what is liable—Defences—Priorities—Evidence. The statute law and practice of each jurisdiction being, as a rule, peculiar to itself, the cases cited are necessarily not all of general application. The general principles of the law are well stated.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. C. HALDIMAND.] [19th OCTOBER, 1885.

FRADENBURGH v. HASKINS.

Insolvent debtor—Husband and wife—Preference—Fraudulent transfer of notes by husband to wife.

In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore that such transfer was made to secure her the payment of moneys lent to him by her. It appeared that immediately after such transfer he absconded from the province. At the trial the jury found in answer to questions put by the presiding Judge, (i) that the husband at the time he absconded was not solvent and able to pay his debts in full; (ii) that he knew himself at the time to be on the eve of insolvency; (iii) that the transfer of the notes to his wife was not voluntary; (iv) that the scheme of such transfer originated with him and not with his wife; the jury however failed to find with what *intent* the transfer was made, and gave a verdict in favour of the defendant (the wife) which on motion in term the Judge refused to disturb.

On appeal, this Court being of opinion that the answers given by the jury did not afford sufficient ground for a decision under R. S. O. cap. 118, ordered a new trial, but under the circumstances directed the parties to bear their own costs both of the appeal and of the new trial.

J. K. Kerr, Q.C., for the appeal.

Coulter, contra.

PROUDFOOT, J.]

In re THE CORPORATION OF THE TOWN OF OAKVILLE AND CHISHOLM.

Prohibition to County Judge—Amending registered plan—Status of applicant—Assign—R. S. O. cap. 111, sec. 84.

The judgment of Proudfoot, J., 9 Ont. R. 274, granting prohibition to the County Judge of Halton to restrain him from adjudicating upon C.'s application, under R. S. O. cap. 111, sec. 84, to amend a registered plan, was reversed.

Held, that the *status* of C., as a person who had registered the plan, or the assign of a person who had done so, was a question of law and fact combined for the County Judge (as it would have been for the High Court or a Judge thereof had the application been made to such Court or Judge under the statute) to determine in the course of the inquiry, and that his decision was not examinable on motion for prohibition.

Semble, whether C. was an assign or not he was entitled to apply for the amendment as being a person who filed or registered the plan.

Moss, Q.C., for the appellant.

Lash, Q.C., for the respondents.

[24th NOVEMBER, 1885.

WALMSLEY v. GRIFFITH.

Appeal to the Supreme Court of Canada—Time—Certificate—Supreme Courts Act, sec. 25.

Held, following the decision of the Supreme Court of Canada in *O'Sullivan* v. *Harty*, 5 C. L. T. 275, that the thirty days for appealing to the Supreme Court of Canada under sec. 25 of the Supreme Court Act will in all cases be computed from the date of issuing the certificate of the judgment of this Court.

J. B. Clarke, for the plaintiff.

Arnoldi, and *J. A. Paterson*, for the defendants.

C. C. LAMBTON.]

McKELLAR v. McGIBBON.

Bill of sale—Registration—Possession.

The defendant seized goods in the possession of McL. under an execution against him, and the plaintiffs claimed the goods under an unregistered bill of sale, given by McL. merely as security for indebtedness, and without change of possession.

Held, reversing the judgment of the Court below, that an ineffectual attempt by the plaintiffs to obtain possession of the goods was not sufficient to satisfy the Chattel Mortgage Act, and that the defendant was therefore entitled to succeed.

Aylesworth, for the appellant.
Street, Q.C., for the respondent.

C. C. RENFREW.] [PATTERSON, J.A., 5TH DECEMBER, 1885.

In re McDOUGALL.

Insolvent Act, 1879—Promissory note, interest on.

The firm of M. & Bro. became insolvent, and the Merchants Bank, creditors, proved before the assignee a claim upon a promissory note for $3,289.30, which claim was paid in full, as were all other principal debts, as of the date of the insolvency. A surplus of the partnership estate remained over, referred to in the former report of this case, 8 App. R. 309. Subsequent to the payment of the principal debt, the Bank made claim before the assignee for payment to them of a large sum for interest accrued upon the principal debt since the date of the insolvency, before appropriation should be made of the surplus to the insolvents or their separate creditors.

It appeared that the claim proved by the Bank was for the amount of a promissory note made by J. L. M., one of the partners, payable to the order of the firm, and endorsed by J. L. M. in the name of the firm, to the Bank. The note was not paid at maturity, but was not protested, as J. L. M. had, in the name of the firm, endorsed a waiver of presentment and notice at the time of negotiating it with the Bank. Evidence was adduced to prove a usage or custom of bankers to charge interest upon overdue notes, and an implied contract by reference to it to pay such interest. By the judgment in this matter (reported 8 App. R. 309), it was provided that the joint creditors should be paid, in addition to the amounts due as of the date of the insolvency, subsequent interest on the amounts, whenever such interest was properly claimable as a debt, and not as damages only.

The assignee disallowed the claim for interest, but, upon a contestation before the County Judge, the decision of the assignee was overruled. Upon appeal by the assignee in the interest of the separate creditors from the ruling of the County Judge,

Held, that, had the note been protested in the usual course, interest from the date of the protest could have been claimed as a debt, under C. S. U. C. cap. 42, sec. 13, sufficient to entitle the Bank to rank therefor in the insolvency proceedings; but that the waiver of presentment and notice was not in this regard sufficient, the statute not being complied with, and the claim was not a debt of the estate, although sufficient to hold the endorsers for interest from the time that they received notice of the nonpayment of the note.

Held, further, that proof of the usage was insufficient, and

Quære, whether such usage, even if proved, could be permitted to be set up where the subject is dealt with by statute.

Lash, Q.C., for the separate creditors of J. S. M., appellant.

J. J. Gormully, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C. J.

LONDON & CANADIAN L. & A. CO. v. MORPHY.

Writ of sequestration—What exigible thereunder—Member's seat on Stock Exchange.

The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a Judge in Chambers ordering the defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against the defendant's goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made, a writ of sequestration issued accordingly.

Held, that although the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the Judge's order was a judgment for disobedience of which the writ might issue, and that this writ was regularly issued.

The defendants were members of the Toronto Stock Exchange, which was a corporation, and held seats at the stock board thereof, shown to be of considerable value and to be saleable by the defendants upon compliance by them with certain by-laws of the corporation. These by-laws provided, amongst other things, for a written application to the Exchange by any member wishing to sell his seat for leave to sell, submitting at the same time the name of the proposed purchaser; and that if the purchaser was, in such a case, acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member of the Exchange unless he had been previously an attorney to a broker member of the Exchange for six months in Toronto, and had, upon his own application, been accepted by the Exchange as a member; the vote for his acceptance having to be by ballot, and four black balls being necessary to exclude. After being accepted, he might purchase a seat from some one already a member, or pay an entrance fee of $4,000 to the Exchange, and by such payment create a seat for himself. The total number of seats to be at the board was limited to forty, whereof thirty-three were taken up by the thirty-three members of the Exchange at the present time.

The sequestrator having applied for an order under this writ of sequestration to sell the defendants' seats at the Exchange,

Held, that such seats were the property of the debtors, and should be saleable under process; that the Court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct a sale of the said seats, and would do so; but that, inasmuch as the Court could not control the exercise of the ballot by the members of the Exchange, no effectual order for sale of the seats could be made.

Semble, that this was a failure of justice, and that there should be legislation to extend the operation of the writ of sequestration to meet such cases; and the application was therefore refused without costs.

Arnoldi, for the plaintiffs.

G. Morphy, for the defendants.

[WILSON, C. J.

MAY v. ONTARIO AND QUEBEC RAILWAY CO.

Railway company—Negligence—Railway employee—Common employment—Dominion Railway Act, 42 Vict. cap. 9, sec. 27—Limitation of action—"By reason of the railway."

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants to be "safely carried" on a train; and that, owing to the defendants' negligence, he was, while so travelling, thrown off the train and injured.

Held, (i) that if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment.

(ii) That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made to safely carry, but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action.

The defendants set up that the injuries complained of happened more than six months before action brought, and that the action was barred by the 27th section of the Consolidated Railway Act; to which the plaintiff demurred.

Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway." *Brown* v. *Brockville & Ottawa Ry. Co.*, 20 U. C. R. 202; *McCallam* v. *G. T. Ry. Co.*, 31 U. C. R. 527; and *Kelly* v. *Ottawa Street Ry.*, 3 App. R. 616, referred to and followed.

Semble, that the concluding words of section 27 of the Consolidated Railway Act, viz. : "That the defendants may prove that the same [that is, the damage] was done in pursuance of the authority of this Act and the special Act," should be read as meaning "in the course and prosecution of their business as a railway company constituted in pursuance of" etc.

F. E. Hodgins, for the demurrer.
R. M. Wells, contra.

Re FENTON v. THE COUNTY OF SIMCOE.

Municipal law—Incorporation of Village—46 Vict. cap. 18, sec. 9, s-s. (O)—Census—By-law—Illegality—Matters how appearing on face of by-law—Power to quash—Estoppel—Laches.

On an application to quash a by-law incorporating a portion of township territory as a village.

Held, that the power of the Court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shown is entirely extraneous.

Enquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed.

The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question ; one of them had been a candidate for the office of Reeve, and another had been elected to the school board ; but none of them had in any way promoted the forming of the by-law, or had had any part in the taking of the census objected to.

Held, that the applicants were not estopped from moving to quash the by-law.

Semble, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council. But where the census was shown to be wholly unreliable and untrue in fact, effect was given to this objection.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be answered by shewing laches of the applicant, although, in this case, no such laches existed.

Aylesworth, for the motion.
McCarthy, Q. C., and *Pepler*, contra.

[CAMERON, C.J.

Re BECKETT & TORONTO.

Expropriation of lands—Consolidated Municipal Act, 1883, sec. 488—Payment into Court, ground for—Party to apply.

Upon the petition of the Corporation of the City of Toronto, praying to be allowed to pay into Court $32,370.50, balance of the compensation money awarded to the estate of the late Edward Beckett for the expropriation of certain lands belonging to said estate for a court-house site, under the provisions of the Consolidated Municipal Act, 1883, sec. 488, upon the ground that Mary Anne Beckett, the executrix and trustee under the last will and testament of the said Edward Beckett, deceased, had not the power under said will to sell the property until her son (then an infant 18 years of age) attained the age of 21 years, or died, or she herself married again; and also that one McNeil had a rent charge or annuity charged upon the land of $216 a year for her life, payable to one Sinclair;

Held, that the Act does not expressly authorize the payment into Court of the amount awarded; that section 488 is imperative, and imposes upon the corporation the obligation of ascertaining whether the person acting in respect of the property expropriated is the absolute owner or not, and if he or she be not such owner, then the corporation is created a statutory trustee of the principal, burdened with the payment of 6 per cent. interest until the person entitled to the principal claims the same.

Held, further, that it was not intended that the Court should interfere at the instance of the corporation, but at the instance of some party claiming the money or part thereof.

But, *semble*, that the Court might so interfere at the instance of the corporation; but that the facts in this case were not sufficient ground for such interference.

E. H. E. Eddis, for the City of Toronto.

George Morphy, for Mary Ann Beckett.

D. Henderson, for McNeil and Sinclair.

Allan Cassels, for execution creditors of Mrs. McNeil.

[WILSON, C.J.

Re SCOTT & TILSONBURGH.

Municipal by-law —Exemption from taxation—Consolidated Municipal Act, 1883, sec. 388.

Where the municipality of a town agreed with T., if he would take their place with a Railway Co. to pay the latter $1,800 and find them a free roadway, upon the company building a switch from their station into the town, to exempt from taxation two of T.'s mills for ten years;

Held, not within sec. 388 of Con. Mun. Act, 1883, amended by the Act of 1884; that there was not a proper public consideration from T. for the exemption; and a by-law passed by the municipality for the purpose, but not passed upon by the ratepayers, was therefore quashed with costs.

Norris, for the motion.

Osler, Q.C., contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 3RD DECEMBER, 1885.

MORRISON v. MORRISON.

Will, construction of—R. S. O. cap. 106, *sec.* 26—*Devise of after acquired realty—"Contrary intention."*

The will of D. M., dated 19th May, 1873, contained the following devise: "I give and bequeath to my brother Robert Morrison, $500, and the property on Hughson street. I give, devise, and bequeath all the rest and residue of my estate, real, personal and mixed, which I shall be entitled to at the time of my decease, to my nephew, Alexander Morrison." The testator died 8th March, 1883. At the time of making the will the testator was possessed of one property on Hughson street, which was known as the Red Lion Hotel, but he subsequently acquired, and owned at the date of his death, other properties on the same street, but unconnected with the hotel and upon the opposite side of the street. The action was brought to determine whether, upon a true construction of the will, the subsequently acquired properties passed under the devise of "the property on Hughson street," or under the residuary devise.

Held, affirming the decision of Boyd, C., (Proudfoot, J., dissenting), that the residuary clause conveyed all property acquired by the testator subsequent to the date of the will, and that a "contrary intention" was sufficiently displayed by the will to render the statute inapplicable.

James Parkes, for defendant Robert Morrison.

E. Martin, Q.C., *Waddell*, and *Furlong*, for other parties.

In re CLEATOR.

Will, construction of—Rule in Shelley's Case.

The will of Mary Cleator, dated 13th January, 1864, contained the following clause:—"I give and devise to my grandson John Cleator, son of my son John Cleator, the farm or homestead whereon I now reside, together with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the same and every part thereof

for and during his natural life, and after his death to the heirs of his body should he leave any such heirs him surviving; and in the event of his leaving no such heirs, then the same, and every part thereof, is to be divided as fairly and equally as may be amongst his brothers and sisters him surviving, to have and to hold the same to them their heirs and assigns forever. But my will and desire is that my said grandson John Cleator shall not have or go into possession of the said farm or homestead until he shall have attained the age of twenty-five years, or five years after my death." Upon the application by petition under R. S. O. cap. 109, sec. 3, to have it declared that the grandson took under the above clause an estate in fee tail, which by subsequent conveyances in the ordinary statutory form, recited in the petition, he had converted into a fee simple, it was admitted by counsel that no other portion of the will affected or threw any light upon the construction of the clause in question

Held, reversing the decision of Proudfoot, J., that there appeared in the will no explanatory context having a direct and immediate bearing upon the words "heirs of the body" used by the testatrix, or any intimation that she did not employ these words in their technical sense; that the gift over did not afford the means of such interpretation; and that whatever the actual intention of the testatrix, a construction must be rendered in accordance with the technical rule; and that therefore the petitioner took under the will an estate tail, transformed by the conveyances into a fee simple.

H. T. Beck, for the petitioner.

B. Jones, for the purchaser.

CLAXTON v. SHIBLEY.

Tax sale—Irregularity—Excessive tax—Lapse of two years—R. S. O. cap. 180, secs. 137, 150, 156.

The land in question was assessed in 1876, as resident land, for $4.88 taxes, and appeared in the collector's return to the County Treasurer in 1877 as resident land, but upon which there was no distress for $2.30 unpaid. The land was in fact occupied. The roll for 1876 showed that $2.58 had been paid. A resolution was passed by the municipal council as to the $2.30 unpaid, but the resolution did not remit, or profess to remit the taxes, but merely professed to relieve the collector in respect of this sum, and was not followed by any by-law of the council. The balance unpaid was carried into the Treasurer's book by error in transcribing, as $2.50 instead of $2.30, and the compound interest was charged upon the $2.50 for the period of five years, making up, with additions of costs of advertising and commission, the sum of $6.06, for which the land was sold. The date of the sale was 21st November, 1881, and of the deed to the purchaser, 19th March, 1883. The present action was brought to set aside the sale, and was begun 14th October, 1884.

Held, reversing the decision of Proudfoot, J., that sections 137, 150 and 156 of the Assessment Act were applicable, and cured the irregularities of the assessment and sale; *Yokham* v. *Hall*, 15 Gr. 335, distinguished; and action dismissed.

Machar, for the plaintiff.

Cassels, *Q.C.*, and *Geo. Macdonald*, for the defendants.

[THE DIVISIONAL COURT, 12TH DECEMBER, 1885.

CLOSE v. THE EXCHANGE BANK.

Interpleader—Jurisdiction of Divisional Court—Appeal from order of County Court—Interpleader Act, 44 Vict. cap. 7 (O)—Marginal Rule 2, O. J. Act.

Upon a writ of execution issued out of this Division to the sheriff of the County of York, a seizure was made of goods which were subsequently claimed by a third party. The sheriff thereupon applied for and obtained an interpleader order upon an affidavit which stated the nature of the goods seized and taken in execution, and that their value was less than four hundred dollars; and the order thereupon directed the issue to be tried in the County Court of the County of York. The issue was tried without a jury and a verdict entered for the plaintiff by the Judge of the County Court. The defendant thereupon appealed to the Divisional Court from the decision of the Judge. No motion was made to strike the cause off the list, but upon the appeal coming on to be argued a preliminary objection was taken by the respondent (plaintiff), that the appeal should have been to the Court of Appeal, and not to this Court, inasmuch as the procedure was governed by the Interpleader Act, under which the interpleader order was made, and this Court had no jurisdiction to entertain the appeal.

Held, (i) that Rule 2 of the O. J. Act establishes a code of practice and procedure for all cases of interpleader, whereby interpleading procedure in all branches of the High Court is assimilated, superseding any variant or inconsistent practice theretofore existing; (ii) that this Rule 2 is to be so read and applied as to regulate the proceedings in all matters of interpleader, which are to be conducted under R. S. O. cap. 54, as extended by the statute 44 Vict. cap. 7 (O); (iii) That inasmuch as the affidavit filed by the sheriff stated the value of the property seized to be under $400, as well as its nature, it was clearly intended that the interpleader order was made under the statute, rather than under the old practice of the former Court of Chancery; (iv) That the statute provides that the appeal should be to the Court of Appeal; and that the Divisional Court has no jurisdiction.

Barker v. *Leeson*, 9 P. R. 107, distinguished, and cause struck out; but without costs (following *Wansley* v. *Smallwood*, 10 P. R. 233), as the objection was taken at the hearing for the first time.

Semble, that the jurisdiction of the old Court of Chancery in matters of interpleader is now practically obsolete, being superseded by the remedy provided by statute.

Bain, *Q.C.*, for the appellants.

Shepley, for the respondent.

[PROUDFOOT, J., 3RD SEPTEMBER, 1885.

McARTHUR v. THE QUEEN.

Application for timber license - Notice of acceptance—Assignment for value—Petition for issue of same—Demurrer—Rule as between subjects, and as between Crown and subject.

McA. filed an application with the proper government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the Commissioner of Crown Lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he, having removed to the United States, never received any notice of such acceptance. In 1881, he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest. The assignments being duly filed in the Crown Lands Department, McA. and B. in 1884, joined in a petition of right for the issue of the license, and the Attorney-General demurred to the same.

Held, that there was no *laches* on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be, under ordinary circumstances, a defence to a claim for specific performance; but if a vendor was aware that the purchaser was treating the right as existing, and making sale of it for valuable consideration, and made no objection he would not be allowed to set up such a defence.

Held, also, that as the assignments were filed in the Crown Lands Department and the Commissioner had the power of forfeiting the claim for non-payment and did not do so, if the rule between subjects were to apply it would not be a bar in this case.

Semble, it may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited.

Irving, *Q.C.*, for the demurrer.

Lash, *Q.C.*, and *Cassels*, *Q.C.*, contra.

[FERGUSON, J., 5TH SEPTEMBER, 1885.

In Re ANDREWS AND THE CANADA LIFE ASSURANCE COMPANY.

Life Insurance—Payment of claim to guardian appointed by Foreign Court—47 Vict. cap. 20, sec. 15 (O).

A guardian of infants appointed by the Probate Court of the Territory of Dakota, U.S.A., petitioned for payment to him of certain money to which the infants were entitled, under a policy of insurance issued by the Canada Life Assurance Company, instead of having the money paid into Court as provided by 47 Vict. cap. 20, sec. 15. The Company did not object to pay the money over as prayed, provided such payment would be a discharge to them under the Act. *Re Thin*, 10 P. R. 490, was cited.

Held, that, inasmuch as it was satisfactorily shown to the Court that the foreign guardian had already given proper and sufficient security to the satisfaction of the Court appointing him, the order might go for payment over of the amount due less the Company's costs of the application, and discharging the Company from all further liability.

C. L. Ferguson, for the petition.
W. F. Burton, for the Company.

HARGRAFT v. KEEGAN.

Will, construction of—Illegitimate child as legatee—Death of illegitimate child during life of testator leaving legitimate issue—Lapse of legacy—R. S. O. cap. 106, sec. 35.

R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children, F. B. and M. A. B., the sum of $1,000. Sixthly, in trust after the payment of the said debts, funeral and testamentary expenses, and the said legacies to pay to my four children (naming them) and their female heirs respectively equally share and share alike, all the rest, residue and remainder of the moneys arising from the sale of my said estate, save and except the sum of $200 hereinafter bequeathed to my said executors." F. A. B. and M. A. B. were illegitimate children; and M. A. B. married and died during the lifetime of the testator leaving children surviving. In a suit for administration and construction of the will it was

Held, that the words "child or other issue" in R. S. O. cap. 106, sec. 35, does not apply to an illegitimate child, and that the legacy lapsed.

J. Hoskin, Q.C., for the infants.
Riddell, for the residuary legatees.
Porteous, for the executors.

[BOYD, C., 26TH OCTOBER, 1885.

IRWIN v. SPERRY.

Action in Chancery Division—Cross action—Jury notice—Claims for damages—Trial.

The plaintiff claimed in this action, which was in the Chancery Division, (i) foreclosure of three mortgages, (ii) payment of an account, (iii) damages for breach of a contract. The defendant claimed in a cross action, in the Q. B. Division, damages for breach of the same contract in respect of which the plaintiff sought relief. The defendant in this action served a jury notice, which the plaintiff moved against.

Held, that the jury notice should stand as to the claim for damages, and that that claim should be tried along with the cross action; the other claims in this action to be disposed of according to the usual practice in the Chancery Division.

W. H. Lockhart Gordon, for the plaintiff.
Watson, for the defendant.

[BOYD, C., 30TH OCTOBER, 1885.

In Re THE QUEEN CITY REFINING COMPANY.

Winding up proceedings—Contributories—Stockholders by subscription or allotment—R. S. O. cap. 150.

In the winding up proceedings of the Queen City Refining Company, the Master placed all subscribers to the stock book upon the list of contributories. The contributories appealed upon the ground, among others, that although they were subscribers for stock, still no stock had ever been allotted to them by the directors, and hence they were improperly placed on the list.

Held, that the subscription signed was an unqualified taking of shares, requiring no acceptance on the part of the directors, and that the Act R. S. O. cap. 50 contemplates two modes of acquiring stock, one by subscription and the other by allotment.

A. Hoskin, Q.C., and *Foster, Q.C.*, for the appeal.
S. H. Blake, Q.C., and *Meyer*, contra.

[OSLER, J. A., 10TH NOVEMBER, 1885.

BANK OF HAMILTON v. HARVEY.

Signing judgment—Interest—Duty of clerk.

The statement of claim in an action on a promissory note asked interest at 7 per cent. per annum, without showing any legal right to charge more than 6 per cent. Judgment was signed by the plaintiffs for default of defence for the full amount claimed.

Held, that it was the duty of the deputy clerk not to permit judgment to be signed for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to 6 per cent. when they came to sign judgment.

Holman, for the plaintiffs.

Aylesworth, for the defendants.

[BOYD, C., 11TH NOVEMBER, 1885.

BANK OF TORONTO v. COBOURG AND PETERBOROUGH R. W. COMPANY.

Company—Directors—Issue of debentures to directors at discount—Locus standi of other creditors.

The judgment in this action directed an enquiry as to who other than the plaintiffs were the holders of the bonds of the same class of the defendant company, and an account of what was due to such bondholders. It appeared that the managing director of the company issued a great number of debentures to J. H. S., G. J. S., and T. S., who were themselves directors of the company, at a discount of 25 per cent. The plaintiffs, who were also debenture holdersof the same class, contended before the Master that these parties could only claim the amount actually advanced by them, and that they could not as directors sell the debentures to themselves at a discount. The plaintiffs did not become debenture holders until after J. H. S., G. J. S. and J. S.

Held, affirming the decision of the Master in Ordinary, that inasmuch as the Company did not complain of the transaction, nor any shareholders, it was not competent for the holders of other debentures of the same class (such as the plaintiffs were), to impugn the position of J. H. S., G. J. S. and T. S.

If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its corporators to complain. To permit the plaintiffs to attack on this ground would be to recognize the validity of the transfer of a right of action to complain o a fraud, actual or constructive.

C. Moss, Q. C., and *T. P. Galt*, for the appeal.

J. Maclennan, Q. C., and *T. Langton*, contra.

[PROUDFOOT, J., 11TH NOVEMBER, 1885.

WOODWARD v. CLEMENT.

Patent of invention—Want of novelty—Mechanical equivalent.

Action for infringement of patent called Arnold's Improved Automatic Boiler.

It appeared that the only portion of the defendant's combination which was not identical with the plaintiff's patented machine, was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention—to effect the same purpose by a slightly different method.

Held, that the plaintiff was entitled to judgment.

Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated.

[PROUDFOOT, J., 11TH NOVEMBER, 1885.

ROBERTSON v. PATTERSON.

Agreement to give covenant to build— Refusal to execute—Specific performance.

In an agreement for the sale of land from R. to P., the terms were inserted in these words:—"Price $1,000, $200 cash and balance in five yearly payments; interest at 7 per cent., and covenant of P. to build house worth not less than $4,000, to be commenced in a year from date, and finally completed in two years * *." The $200 was paid down and R.'s solicitor prepared and tendered the deeds (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them, and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the Court.

Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of a certain value within a specified time. *Wood* v. *Silcock*, 59 L. J. N. S. 251, distinguished.

Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *Wilson*, for the defendant.

[BOYD, C., 11TH NOVEMBER, 1885.

FOSTER v. ALISON.

Admissions before Master—Practice—Necessity of memorandum in writing.

As in the case of admissions between solicitors, so in the case of admissions before the Master, the matter agreed upon should be put into writing and signed. By an order of 1696 it was provided that "where upon reference any matter of fact shall be admitted and agreed to before the Master, he shall take memorandum of the fact so admitted and agreed to in his books of minutes, and the party so admitting and agreeing shall subscribe in such minutes a memorandum in the presence of the Master, which subscription shall be binding and conclusive to the party on whose behalf the same was so subscribed, so as that the other side shall not be put to any further proof to make good the same."

[BOYD, C., 11TH NOVEMBER, 1885.

STINSON v. BLOCK.

Conversion—Measure of damages.

In this action the plaintiff complained that the defendant wrongfully detained and converted certain goods of his by refusing to allow the same to be removed pursuant to the plaintiff's demand on 23rd December.

It appeared that when the plaintiff sent for the goods, on the 23rd December, he was allowed by the defendant to remove a considerable portion of them, but that the defendant refused to allow him to remove any of the bulkier goods until after Christmas, deeming that this would interfere with his own trade. On 26th December the defendant notified him by letter that he could remove the balance of the goods. The plaintiff thereupon sent for the goods, but found a bailiff in possession under process issued by certain attaching creditors. The plaintiff contended that he was entitled to recover the value of the goods and his expenses.

Held, affirming the judgment of the Master in Ordinary, that the plaintiff was only entitled to nominal damages, *plus* the expenses actually incurred by him in consequence of the detention of the goods; for by acting on the letter of 26th December, he condoned the previous wrong of the defendant, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property; but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct but because the claim of the attaching creditors intervened.

The old learning on the subject of conversion need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is

wrongfully deprived of them. In all such cases the real question is whether there has been such an authorized dealing with the plaintiff's property as has caused him damage, and if so to what extent he has sustained damage.

Read, *Q.C.*, and *Walter Read*, for the plaintiff.
Watson, for the defendant.

[BOYD, C.

TAYLOR v. McGRATH.

Trust for sale—Wilful default—Delay of many years—Account rendered—Appropriation.

C. M. invested money of T. on a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mortgagee; A. M. held the second mortgage on the property. Finding that, owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C. M. should out of his own moneys buy in the property by paying off the first mortgagee, and then hold the same on trust to sell, and out of the proceeds to first repay himself the amount so advanced by him with interest from the date of the sale, then to pay A. M. his claim on the property with interest, and then to pay T. his claim with interest. C. M. accordingly advanced sufficient to buy in the property. In 1864, a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M., and T., whereby the property was conveyed to C. M. in trust to sell "without delay," and apply the proceeds as aforesaid, giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default."

C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages.

The evidence showed that the property had all through been of a very unsaleable kind, consisting of a farm badly cleared and badly fenced, and an old mill which had quite lost its value for milling purposes. It also appeared that C. M. had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property likely to be bought by a stranger. There was also no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883. And it appeared that up to 1880, neither A. M. nor T. had complained of the delay, but, if anything, acquiesced in it.

Held, under all the circumstances of the case, affirming the decision of the Master in Ordinary, that C. M. was not proved to have been guilty of neglect and default as trustee, nor did the evidence afford any basis for assessing damages against him.

It also appeared that in 1880 on T.'s solicitors demanding an account from C. M. of his dealings with the trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S. in so doing applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M., moreover, was produced in the Master's office, wherein he stated that this account was correct and made out under his supervision. After judgment in this action which referred it to the Master in Ordinary to take the account of C. M.'s dealings as trustee, and before the same was taken in the Master's office, C. M. died, and on the return of the Master's warrant to bring in the account, C. M.'s executors brought in a new account differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing on C. M.'s claim, which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.

Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors, and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand.

McGregor v. *Gaulin*, 4 U. C. R. 388, distinguished.

Moss, *Q.C.*, and *Lefroy*, for the executors of C. M.

Lash, *Q.C.*, and *H. Cassels*, for the plaintiffs.

McPhillips, for A. Mitchell.

[BOYD, C., 30TH NOVEMBER, 1885.

McCALLUM v. McCALLUM.

Taxation—Local Registrar—Certificate—Notice of Appeal—Counsel fees—Instructions.

Where no formal certificate of the result of a taxation between party and party of the costs of the action by a local registrar was filed, but where the bill of costs, with a memorandum at the end, showing the result of the taxation, signed by the registrar, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and where it was admitted that execution had been issued upon such memorandum.

Held, that the absence from the files of a more formal certificate was not a bar to the appeal.

Two clear days' notice of such an appeal is sufficient.

A counsel fee of $5 for each necessary and proper enlargement of a Court motion should be taxed.

Where charges for a brief are allowed, instructions for brief should also be allowed.

Holman, for the appeal.

Douglas Armour, contra.

In the Maritime Court.

THE "JOHN OWEN."

(Reported by R. Gregory Cox, Esquire, Barrister-at-law.)

Collision between raft in tow and vessel—Duty to begin, where defence inevitable accident—Presumption of negligence arising from accident—Onus of proof—Responsibility of tug for accident caused by unmanageability of tow—Lights of vessel at anchor—Necessity of watch when vessel at anchor not in a fairway or roadstead.

Held, where the defence is inevitable accident, the plaintiff must begin.

Held, also, that the fact of a steamer in motion colliding against a stationary vessel is itself *prima facie* proof that the accident was caused by the steamer's fault.

Held, also, that where through any special circumstances navigation is rendered more difficult and hazardous than usual, vessels are bound to use additional care to prevent accidents.

Held, also, that where a vessel is lying at anchor not in a fairway or roadstead, and out of the ordinary course of vessels, she is not bound to keep an anchor watch.

The petition in this cause was filed 2nd November, 1881, on behalf o Odette & Wheny, owners of the tug *Minnie Morton*, against the tug *John Owen* to recover $3,000 damages occasioned to the *Morton* by the negligence of the *John Owen*.

The petition alleged that the *Owen* is an American vessel, registered at Detroit. On the evening of 1st October, 1881, the *Morton* was lying at the head or north end of Bois Blanc Island, in the Detroit River, in Canadian waters, close to the Island, 200 yards from the channel, between the Island and the Canadian shore. About 8 p.m., the *Owen*, bound down the river with a raft of logs in tow, passed on the Easterly side of the point where the *Morton* was lying. In passing the point the *Owen* was negligently steered nearer to the Island than she should have gone, and, on account of the size of the raft, was unable to exercise proper control over it. In consequence, the raft was carried by the current in a westerly direction against the *Morton*, and she became entangled among the logs composing the raft, and was carried out into Lake Erie, where she sank. The petition further alleged that the slow rate of speed at which the *Owen* was steaming and her neglect to pursue a proper course, directly contributed to the disaster by permitting the raft to approach very near to the *Morton*, and at an insufficient rate of speed to resist the action of the current. The *Morton* had her anchor light displayed, and was easily visible to approaching vessels. The accident was imputable solely to the fault of the *Owen*, her master and crew.

On 30th November, 1881, an answer was filed on behalf of John Emory Owen, of Detroit, owner of the tug *Owen*, intervening, denying the charges of negligence and improper management, etc., and alleging that the *Owen* was, at the time in question, engaged by the day by Messrs. Jackson &

Son, of Tonawanda, N. Y., to tow the raft, with which she was proceeding down the Detroit River; that Jackson & Son had placed their agent on board the *Owen*, for the purpose of controlling her movements, and she was subject to and acting under his orders; that the *Owen* left Sandwich with the raft in tow and proceeded safely down the river; that after passing the Lime-kiln Crossing, her course was kept as near to the easterly bank of the river as was safe, and she was proceeding at as rapid a rate of speed as was practicable. After leaving Sandwich, the answer further alleged, a strong north-easterly wind arose, and at the time of passing the Island, was blowing very strongly, and the action of the wind caused the rear end of the raft to be thrown over towards the upper end of the Island, notwithstanding the efforts of the tug to tow and keep the raft off the Island; and if the raft came into collision with the *Morton*, it was not imputable to any fault of the *Owen*, her master or crew. The accident might have been avoided, it was further alleged, if a competent and careful watch had been kept on the *Morton*, whereas no look-out or watch was kept. The *Owen* had all her lights burning and visible, but the *Morton* had no anchor or other lights. The night was dark and the *Morton* could not be seen against the dark back-ground of an Island.

The cause was heard before G. W. Leggatt, Esq., Surrogate Judge, at Sandwich, on the 16th, 17th, 18th, 22nd, 23rd and 24th days of February, and the 11th and 12th days of March, 1882.

M. A. McHugh, for the plaintiffs.

Duncan Dougall, for the defendant.

A large mass of evidence was taken.

The learned judge found as conclusions of fact, that the raft was too large to be safely managed by the tug, and that the tug got too far to the westward below the drills, and failed to cross to the Canadian shore in time to recover the raft from the force and gush of the westerly currents; and had lost the command and control of the raft.

Judgment was reserved, and pronounced on the 29th August, 1882.

LEGGATT, S.J. I judge from the authorities that the course pursued in this case at the trial in taking the evidence submitted, and with reference to the *onus* of proof, was correct. Where inevitable accident alone was relied on by the defence it was the practice to require the defendant to begin, but now it is changed in that respect. In the case of the *Otter*, Sir Robert Phillimore says, "The practice of the Court has of late rather got out of gear, as to the right to begin in the case of damages when the defendants rely on the defence of inevitable accident. Up to the time of the decision of the Judicial Committee in the *Marpesia*, I," says his Lordship, "following the practice of my predecessor on the point, was accustomed to hold that a defendant in a damage suit, relying on the defence of inevitable accident, was bound to begin: but after that case I thought it my duty to hold that in such a case the party complaining must begin." And such I believe now to be the established practice both in England and the States. Besides, in this case there are other issues on the pleadings which made that course proper here, and I presume the

libellants must show by a preponderance of evidence that the damage suffered by them was attributable to the fault and negligence of the *Owen*.

It has been strongly urged upon me that the *Owen* cannot be held responsible for this disaster until some convincing affirmative evidence has been adduced by the libellants, aside from the collision itself, to show that the *Owen* was in fault or that she had violated some law, some rule, some custom, and that her crew or captain did not simply err.

This may be conceded to a great extent. In this case, however, there was no unusual convulsion of the elements or sudden hurricane which nautical men could not anticipate, no *vis major*, causing a collision which a proper display of nautical skill might not have prevented.

The wind was light and from the south-east; I think a preponderance of evidence shows this; and it is also shown by the testimony of the diver Quinn and others, Captain Hackett among them, that a south or north-easterly wind would deaden the current at the mouth of the river in this neighbourhood, and consequently, in fact, there were less than ordinary perils to guard against, and the raft was less liable than if there was no wind or from some other quarter that night to be taken by the current to the westward. To use the words of Greer, J., in the *Granite State* (*a*): "Under such circumstances we are not called upon to enquire wherein the tug and raft were not managed with proper nautical skill; all these enquiries are superfluous when the collision was caused by a vessel having the power to move or stop at pleasure, in a channel of sufficient breadth, without any superior force compelling her to the place of collision. The fact that, in these circumstances, the steamboat did collide with the barge is conclusive evidence that she was not properly managed and that she should be condemned to pay the damage caused by the collision." In *Scott* v. *London and St. C. Dock Co.* (*b*), plaintiff, as he was passing by a warehouse of defendant, was injured by bags of sugar falling from a crane by which they were lowered to the ground. The Court said there must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendant, that the accident arose from want of care. This case is cited with approbation, 11 Wall. 129, and in *Mullen* v. *St John* (*c*). Plaintiff was injured by the fall of an occupied building owned by defendant; held that from the happening of such an accident in the absence of explanatory circumstances, negligence should be presumed and the burden cast upon the owners to disprove it. A presumption of negligence from the simple occurrence of an accident seldom arises except where the accident proceeds from an act of such a character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, or when it is caused by the mismanagement or misconstruction of a thing over which defendant has

(*a*) 3 Wall. 310.
(*b*) 3 Hurl. C. 596.
(*c*) 57 N. Y. 567.

immediate control and for the management and construction of which he is responsible. *Transportation Company* v. *Downer* (*d*).

Where a stage coach which is overloaded breaks down, the excess in the number of the passengers has been held to be evidence that the accident arose from overloading. *Israel* v. *Clark* (*e*); Saunders on Negligence, page 50; and see the judgment of Pollock, C.B., in *Byrne* v. *Booal* (*f*), a case somewhat similar to *Mullen* v. *St John*, referred to *supra*.

He says, "I think it would be clearly wrong to lay down as a rule that no presumption of negligence can arise from any accident. Suppose, in this very case, that the barrel had merely rolled out of the warehouse window and fallen upon the plaintiff, how could he possibly ascertain how it occurred?"

"Those who have the care of the barrels should take care that they do not roll out, and I think that is a case where it seems to me clear beyond doubt that there would be *prima facie* evidence of negligence. It cannot be in the ordinary course of business without some negligence, and to say that the plaintiff, who complains of that, is to call witnesses from the upper warehouse where the thing happened, or to go about and enquire what the cause was, would be, as it seems to me, unjust. Or if you set an article that is calculated to do damage altogether in a wrong place and it does a mischief, then those who are responsible for its being in the right place and under proper control, are, I think, *prima facie* responsible for the damage, and the burden is cast upon them of showing such a state of things as to relieve them from responsibility." In the same case Chancellor B. said: "The facts are that a barrel of flour came from a window in a house or shop of which the defendant was occupier, and he is responsible if anybody is responsible. Then the question is whether there is any evidence of negligence which ought to go to the jury—not a mere *scintilla* of evidence, but any evidence to entitle the plaintiff to a verdict. I am of the opinion that there is abundant evidence. I think that a person who has a warehouse by the side of a public way and assumes to himself a right to lower from the upper part of the premises a barrel of flour into a cart standing by, has a care and a duty thrown on him. I quite agree in the argument that it is not every accident that would warrant the inference of negligence. On the other hand I entirely dissent from the doctrine that there is no accident which, in itself, would warrant the inference of negligence: and see Saunders, page 49, where a number of cases are gathered together under the title, 'What Facts are Evidence of Negligence.'"

It seems to me that the libellants have made out a good *prima facie* case against the *Owen*, whether we regard the collision as having been caused by the negligence of the *Owen* in proceeding too far down the river before crossing to the Canada shore at the head of the Island, or the unmanageableness of the raft in consequence of its size, and the inability of the tug to handle and control the movements of the raft which it had to tow; and unless the evidence for the defence is sufficient to satisfy a reasonable

(*d*) 11 Wall. 134.
(*e*) 4 Esp. 259.
(*f*) 33 L. J. Ex. 13.

mind that the collision was the result of a *vis major* or inevitable accident, or unless it is made to appear that the *Morton* or her crew were guilty of negligence or a want of proper precaution, or were guilty of some infraction of some maritime rule or law which was the direct cause of the collision, and thereby were to blame, the *Owen*, it is conceded, must bear the consequences.

While conceding to the respondent the right to use the navigable waters of the Detroit River for the purpose of transporting logs and rafts of timber from one point to another, he can claim no greater privilege or exemption from responsibility than those who ply the same waters in the ordinary manner.

If, through altered circumstances, the navigation of a particular part of the river becomes more dangerous, intricate, and difficult to go through with a raft than before, it would become the duty of those who use these waters for that purpose to use additional precautions, so as not to endanger or imperil the property of others. It must be conceded, I think, that a raft with two or three millions of feet of timber in it could be taken down stream with greater safety and less difficulty before the drills and dredges were placed at the Crossing than can be done now with these obstructions in the river. The additional care that suggests itself to me as necessary to be taken by a tug towing a raft down at this point, under the circumstances, would be to reduce the size of the raft and thus make it more manageable and easier to handle while passing the river at this point, so long as the drills are in position at the Crossing. If the tug chooses, however, to take the chances, the responsibility must be hers as well.

The following is given as the definition of inevitable accident, by Dr. Lushington, as quoted in the case of *The Pladda* (*g*). "In my apprehenhension, an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable."

So it may be said with equal cogency, that if the *Owen*, in going down the river with a raft containing three million feet of lumber, caused the raft to collide against and carry away the *Morton* in the manner described, it is no valid excuse for the respondent here to aver that he could not prevent the accident, when he could have taken such measures of precaution, such as taking only such a raft as could be more readily controlled or handled by the tug, and of less dimensions, which would have rendered the collision less probable.

And see Desty, section 385: What is inevitable accident, where the master proceeds carelessly and afterwards circumstances arise when too

(*g*) L. R. 2 P. D. 38.

late to do what is fit and proper? The *Juliet Erskine* (*h*). Breaking from her tug and being carried by wind and tide against a steamer moored at her pier. The *A. R. Wetmore* (*i*). In considering the second part of the case, as to whether the defendant has met the case by shewing that the *Morton* was in fault and not entitled to recover, we have the fact pretty well established, that the tug *Swain* was lying at the head of the Island about 100 feet from the shore, sunk, and that the *Morton* was moored alongside of her: that the *Swain* was lying broadside on with her bow to the west and at a point about 230 feet west of the range lights and about 600 feet west of the channel bank. If Mr. Laird's delineation of the head of the Island is correct—and it corresponds with Comstock's chart—the boats were apparently some distance to the west of the extreme northernmost point of the Island, the shore of the Island at the northern end trending away at an angle to the south-west, leaving as it were a point jutting out between the vessels and the east side of the Island.

It is also in evidence that there is deep water at the head of the Island, and there is what may be called a channel across the head of the Island and southerly to the west of the Island. This channel, however, for some reason, is seldom or never used, either by tugs, steamboats, or vessels, or indeed, I may say rafts; it is out of the way of the main course down the river, which always is to the east of Bois Blanc. Sometimes vessels drift, when there is no wind, close to the head of the Island and then have to drop anchor to prevent their being taken around to the west of the Island, and there await a tug or breeze strong enough to relieve them from their awkward plight. Rafts never use this channel intentionally, nor indeed do any kind of craft visit the spot as a rule, for any purpose, anchorage or otherwise. All the witnesses concur, I think, in saying that the spot where the *Swain* and *Morton* were was a safe place to anchor or tie up, and the only danger that a vessel so anchored there would experience or be subject to would be an untimely visit from a stray raft. They differ in their opinion as to the propriety and necessity of a vessel having an anchor light and watch on board when lying in that neighbourhood. It seems to me, however, that the locality immediately about the head of the Island cannot be considered either a fairway or a roadstead.

The evidence as to the course and force of the wind on the day of the collision showed, I think, that it was south-east and a light breeze. I am not referred to any statute in force in this country which makes the certificate of the War Office at Washington evidence in our Courts here as to the force and direction of the wind at any particular point of observation throughout the States. At all events, I do not think the force and direction of the wind at a high altitude in Detroit, 20 miles away, is any evidence of its direction and force at Amherstburg or the confluence of the river with Lake Erie at a low elevation and land-locked locality.

Our statutes, 31 Vict. cap. 58, make the same provisions regarding lights as are required by the laws in the States. Sec. 2, art. 7, declares that all ships, whether steamships or sailing vessels, when at anchor in

(*h*) 6 Notes of Cases, 634.

(*i*) 5 Bev. 147.

roadsteads or fairways shall exhibit where it can best be seen, but at a height not exceeding twenty feet above the hu l, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all around the horizon; and at a distance of at least one mile. This statute was substantially complied with: see the evidence of Harry Askew, who describes in a way that impresses one that he is stating the truth, and very minutely, how he put up the light just before the collision and that at this time it was burning brightly. And when the existence of a light is proved the presumption is that it continued to burn. See Desty, 364. This evidenee of Askew's is corroborated by other witnesses as well.

The case of *Ure* v. *Coffman et al.* (*j*), is very like this in many of its features, and Mr. Justice Wayne in his judgment says: "If the statement of the pilot is taken as the fact of the case, it must be conceded that the *Gipsey* was put across the river a little below where the flat boat lay and so near the bank that she could not have been run above her by pursuing that course without a collision. Running so near to the bank when there was ample channel way out in the river for the steamer to pass the point and the curve made by it, at which and within which the flat boat was fastened, was a want of proper care.

"The collision was caused by the steamer not having been kept on a course further out from the bank. That of itself is sufficient to make her answerable for all the consequences of it without any regard to the fact that the flat boat had no light. In such a view of the case it is not necessary for us to consider the point that the flat boat had not a light to show herself or her mooring; tied as she was, in a recess of the land with a point of land extending into the river below the wood yard, there was no necessity to show a light to protect her from the boats ascending or descending the river, as she was actually fastened to the bank out of the line of a customary and safe navigation up or down the river. In other words, the steamer was either run closer into the bank at that point of the river, and out of what should have been her course, to make her landing at Mather's, or she was run head on the flat boat where the latter was tied to the bank. When a boat or vessel of any kind is fastened for the night at a landing place to which other boats may have occasion to make a landing in the night, it is certainly prudence for her position to be designated by a light, on her own account as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bend of a river, not in a port or harbour, or at a place of landing out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so." And in the case of *The Bridgeport* (*k*), Mr. Justice Bradley, in giving judgment, says: "An attempt indeed is made to throw the blame on the *Margaret Evans* herself because she did not have a light and because she had no anchor watch. The fact is she had a night watchman on board, and as to a light, we hardly think it was necessary for a vessel lying at a wharf more than two hundred feet outside of the channel to anticipate

(*j*) 19 How. 56.
(*k*) 14 Wall. 119.

the visit of stray steamboats in the night time, and to make provision for such an exigency."

In the *Granite State* (*l*), Mr. Justice Grier says: "It is not controverted that the barge, which was fastened to the end of the pier, was in a place she was entitled to occupy, that she was not required to have a light suspended during the night time, as vessels anchored in the channel are required, nor to have a watch kept on board to warn off steamboats using the channel of the river. She was not in any track the steamer was required to take, and being incapable of motion, cannot be justly charged with any participation or fault in causing the collision."

The cases cited by the respondent to show that an anchor watch was indispensable are distinguishable here. In the case of *The Clara Blanchard* the place where the *Newall* was lying was a harbour of refuge—an artificial harbour—off the coast of Delaware, constructed by the United States in aid of coastwise commerce of the country. Sixty or seventy vessels had at this time put in there to avoid an impending storm, etc. The facts found were, among other things, that if the *Newall* had had a sufficient watch on deck the accident might have been prevented; the failure to keep a watch on the deck of the *Julia Newall* was the cause of the collision. The night was dark, moon gone down, the tempest had begun and was increasing; a large number of vessels were already within the breakwater, and others were constantly arriving. The case of the *Sapphire* is also distinguishable; a gale was pending and she was anchored in a locality likely to be visited by other vessels, and the watch had timely and ample notice of the approach of the colliding vessel, but made no preparation or precaution to avoid the collision till too late, and the want of a proper watch was the cause of the collision. The evidence here is contradictory as to whether the *Morton* could have been got out of the way in time to avoid the collision if the raft had been seen coming. The evidence is anything but conclusive on this point, and I could not hold if there had been an anchor watch that he could have got the *Morton* out of the way by slipping her mooring and letting her drift with the current, or by taking her around to the west of the *Swain*. Nor can I hold from the evidence that if there had been a night or anchor watch the collision could have been avoided. Contributory negligence, however, will not disentitle the plaintiff to recover damages unless it be such that but for such negligence the injury would not have been sustained, nor if the defendant might by the exercise of care on his part have avoided the consequences of the negligence of the plaintiff. *Tuff* v. *Warrinner* (*m*), and see the oft quoted case of *Davis* v. *Mann* (*n*).

In the *Granite State*, before quoted, it was held that a barge which was fastened to the end of a pier which she was entitled to occupy, was not required to have a light suspended during the night-time as vessels anchored in the channel of a river are required, nor to have a watch kept on board to warn off steamboats using the channel of the river. And so in the case of the *Bridgeport*, where it was held that a vessel lying at a wharf 200 feet outside of the channel was not required to anticipate the

(*l*) 3 Wall. 310.

(*m*) 2 C. B. N. S. 740.

visits of stray steamboats in the night-time and to make provision for such an emergency.

The evidence of the crew of the *Owen* that were examined, the mate, watchman, and engineer, all fortifies the conclusion that I have arrived at, as to the unwieldiness of the raft and the impossibility of the tug—from the dimensions of the raft, its breadth and length—pulling it through the river with safety. And that the *Owen* was too far to the west, after passing the dredges, to be able to recover the control of the raft sufficiently to bring it into the channel between the Island and the mainland (Canadian shore), without tailing to the westward and striking the Island as it did.

There is nothing in all the evidence for the defence, which shows that the collision was an inevitable one, or could not have been avoided if the raft had been of smaller dimensions. On the whole, therefore, I must, I conceive, pronounce in favour of the petitioners, and condemn the *Owen* for all damages sustained by the petitioners in consequence of the collision and total loss of the *Morton*.

Nothing remains now but for me to assess the damages which it is conceived the libellants have sustained by the loss of their tug. The evidence with reference to the value of the *Morton* is certainly conflicting, running to the two extremes, just as the witnesses are brought forward to testify for the one or the other of the parties interested. They estimate her value from $3,500 to $500.

After giving this evidence the best consideration I could, I have arrived at the conclusion that it would take the sum of $2,600 to replace a tug or steamer like that of the *Morton*, and I so assess the damages sustained by the libellants, and I order and decree accordingly, that the *Owen* was alone to blame, and should pay the same to the libellants with costs.

N.B.—Upon appeal to the Supreme Court, this judgment was affirmed, on the ground that there was no evidence to justify fault being imputed to the *Minnie Morton*, and that the damages awarded were reasonable; and also that the evidence as to the light which was proved to have been seen on board the *Minnie Morton* was sufficient to justify the finding of the Court, that the statute had been substantially complied with.—Rep.

(*n*) 10 M & W. 549.

In the Second Division Court of Lincoln.]

[Senkler, J., 28th October, 1885.

SMITH v. IRWIN.

Master's liability for necessaries supplied to the vessel.

Where the necessaries are supplied under circumstances which show that credit was given to the owner exclusively, the Master is not liable.

The facts are stated in the judgment.

This action is brought by the plaintiff, a butcher in St. Catharines, against the defendant, who was master of the schooner *Sligo*, in 1881, to

recover the value of a quantity of meat supplied by the plaintiff at various times during the season of navigation of that year to that vessel, amounting to $71.61, and which meat, he says, was ordered by the defendant. The defence admits the furnishing the meat, but contends that it was furnished on the credit and order of Captain Graham, the owner of the *Sligo*, and that the plaintiff rendered the bill to Captain Graham, and had no idea of claiming the amount from the defendant until after the death of Captain Graham, and the discovery that his estate was unable to pay.

The law on this subject is clearly laid down in *Abbott* on Shipping, 11th Ed., p. 107, where, in speaking of the objections to pay for stores supplied to vessels, it is said: "It should be premised, however, that the master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to his owner only. But such a contract made by the owners themselves, or under circumstances which shew that credit was given to them alone, give the creditor no right of action against the master." In the present case the plaintiff swears that the meat was ordered by the defendant. On cross-examination, however, he says he does not remember the defendant coming for meat himself more than two or three times. He also says that Captain Graham, who owned and employed a large number of vessels, had often given him at the opening of navigation a contract to supply some particular vessel with meat during the season, and would go with him to the vessel and inform the master, and that afterwards the plaintiff would go to the vessel, and get orders from the master or cook. Although he does not think that this vessel was given to him to supply, he does not say positively it was not. He says that he rendered the bill (made out in the name of the *Sligo*), to Captain Graham, and when Graham asked him to let it stand until another year, he assented. The plaintiff also testified that he did not look to Irving for payment. Young Graham, who is administrator of his father's estate, states that it was the custom for his father to order the masters of his vessels, when in St. Catharines, to go to certain stores, and that he made the arrangements as to prices, etc.; that when from home the masters bought where they pleased, but in St. Catharines where they were told to buy.

Upon the whole evidence, I am of opinion that the meat now sued for was supplied not on the credit of the defendant, but on that of Captain Graham, and on that ground I give judgment for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

EX PARTE GLIDDON : IN RE THE MARITIME BANK v. CARVILL.

Bankruptcy—Partnership—Non-resident partner—English Bankruptcy Act—Trustee appointed under—Property vesting in—Jurisdiction of Supreme Court.

A firm consisting of A. and B. carried on business in England, and also in New Brunswick—A. residing in England, and B. in New Brunswick. The firm became insolvent, and petitioned the Court in England for liquidation under "The Bankruptcy Act, 1869," which was adjudged, and a trustee of the estate appointed.

Quære—Whether the provisions of "The Bankruptcy Act, 1869," apply to this Province, and whether property belonging to the firm here vested in such trustee.

A judgment creditor of the firm in the Province issued an execution, under which property belonging to the firm here was seized and sold by the Sheriff, who refused to pay the proceeds to the trustee. On an application to the Court, under the 74th section of "The Bankruptcy Act, 1869," for an order to the Sheriff to pay the proceeds of the execution to the trustee,

Held, 1. That even if the English Bankruptcy Act did apply to this Province, this Court had no jurisdiction as a Bankruptcy or Insolvent Court. 2. That no sufficient application had been made to this Court by the English Bankruptcy Court, under the 74th section, to justify this Court in acting in aid of the English Bankruptcy Court in the matter. 3. That if the property of the firm in this country vested in the trustee under the Bankruptcy Act, he might have brought trover against the Sheriff for the seizure under the execution, or an action for money had and received for the proceeds of the sale; and therefore the Court would not interfere on a summary application.

Held, also, that the affidavit on which the application was made need not be entitled in the suit in which the judgment was obtained.

REGINA v. BLAIR AND STAPLETON: *In re* FRASER.

Seamen's Act, 1873—Conviction for harbouring foreign sailors—Written consent of Consul to prosecute—Certiorari—When return may be amended.

A conviction under the Stat. 36 Vict. cap. 129 (D) for unlawfully harbouring foreign sailors—deserters from a foreign ship—should show on the face of the proceedings, either the consent of both parties, or the written consent of the foreign consul, that the Justice should proceed, as required by section 127 of the Act; and where such consent did not so appear, an affidavit stating that the Justice had the consent, was not allowed to be read on showing cause against a rule *nisi* to quash the conviction.

Where, in such a prosecution, both parties had treated the vessel as a foreign vessel, and the master and sailors as foreigners, although there was no direct proof that they were so; it is too late, on showing cause against a rule *nisi* to quash a conviction based on the vessel and crew being foreign, to object that there was not evidence of those facts.

TENNANT v. BELYEA.

Liquor License Act, 1883—Seizure of liquor under sec. 82 of that Act—Dismissal of complaint for unlawfully keeping liquor for sale—Right of defendant to have liquor restored to him—Replevin.

A quantity of liquor was seized by the Inspector of Licenses, under the 82nd section of "The Liquor License Act, 1883," as being kept for sale contrary to the provisions of that Act, and an information was laid for so unlawfully keeping the liquor for sale. This information was tried, but the charge was not proved and the complaint was dismissed. In an action of replevin afterwards brought for the recovery of the liquor,

Held, that upon dismissal of the complaint the right of the Inspector to retain possession of the liquor ceased; and that the plaintiff was entitled to have it restored to him without any order from the magistrate.

In re PALMER AND CALHOUN.

Arbitration—Refusal to make submission a rule of Court—Action pending on the award.

An application to make a submission to arbitration a rule of Court was refused, where an action was pending on the award, and where there was a dispute as to the validity of it.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

HUNTER v. CARRICK.

Infringement of patent—New invention—Combination—Want of novelty.

The judgment of the Court of Appeal, 10 App. R. 449, was affirmed, STRONG and HENRY, JJ., dissenting.

Cassels, Q.C., for the appellant.
Robinson, Q.C., for the respondent.

LONG ET AL. v. HANCOCK.

Interpleader issue—Insolvent Company, chattel mortgage by—Preference over other creditors—Intention to prefer.

The Hamilton Knitting Co., being indebted in a large amount to the appellants, and believing that their charter did not permit them to give a mortgage on their property to secure an overdue debt, agreed to give such mortgage in consideration of an advance by appellants of more than the amount of the debt, the actual amount to be returned to the mortgagees. This arrangement was carried out, and the balance of the amount advanced on the mortgage, after paying the debt, was put into the business of the Company.

At the time this was done, the Company believed that by getting time from these creditors they would be able to carry on their business and avoid failure. This hope was not realized, however, and they shortly after stopped payment, and in consequence certain of their creditors (the above respondents) obtained judgments on their respective claims and issued executions. The property secured by the said chattel mortgage was seized under these executions, and this interpleader issue was brought to test the title to such property.

The learned Chancellor, before whom the issue was tried, gave judgment (7 Ont. R. 154) for these execution creditors, holding the mortgage void under the statute relating to fraudulent preferences, and the Court of Appeal sustained this judgment, by a division of the Court. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Chancellor, that as the Company *bona fide* believed that by getting an extension of time from the appellants they would be able to continue their business, the chattel mortgage could not have been given with a view of preferring certain creditors and of defrauding the other creditors; and therefore it was not void under the statute relating to fraudulent preferences.

Appeal allowed with costs.

Crerar, for the appellants.

Martin, Q.C., and Cameron, for the respondents.

CANADA PUBLISHING CO. v. GAGE.

Trade mark—Right to use one's own name—Goods designated by one's own name sold to deceive public.

The judgment of the Court of Appeal, 11 App. R. 402, 4 C. L. T. 487, was affirmed, Henry and Taschereau, JJ., dissenting.

Robinson, Q.C., and *Maclennan, Q.C.*, for the Canada Publishing Co., appellants.

Barwick, for Beatty.

S. H. Blake, Q.C., and *Lash, Q.C.*, for the respondent.

O'SULLIVAN v. HARTY.

Administrator—Acts of—Acting by agent—Next of kin.

The judgment of the Court of Appeal, 10 App. R. 76, was affirmed.

O'Sullivan, for the appellants.

Maclennan, Q.C., and *Whiting*, for the respondent.

WHITE v. CURRIE.

Solicitor and client—Negligence—Omission to include property in mortgage—Omission to register—Laches by client—Delay in pressing claim.

C., a member of defendants' firm of solicitors, was employed to prepare a mortgage for W., who gave him instructions partly verbal and partly written. Nearly six years after, W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage which he claimed to have been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court below, that as the plaintiff had delayed for so long in prosecuting his claim against the defendants, and the judge who heard the cause had decided against him, this Court would not interfere with that judgment, affirmed as it was by two Courts.

Osler, Q.C., and *Laidlaw*, for the appellant.
J. K. Kerr, Q.C., for the respondent.

ONTARIO PRINTING AND PUBLISHING CO. v. BUTTERFIELD.

Patent—Assignment of interest in patent—Subsequent infringement—Estoppel—Want of novelty.

Held, reversing the judgment of the Court of Appeal, 11 App. R. 145, that the patent of the plaintiffs, under which they claimed, was a valid patent, and as there was no doubt that it was infringed by the manufacture and sale of defendant's books, the judgment of the Chancellor should be restored.

Cassels, Q.C., for the appellant.
Kingsford, for the respondent.

BYRNE v. ARNOLD ET AL.

Justices of the Peace—Conviction by—Canada Temperance Act, 1878, sec. 105—Absence—Wrongful arrest—Justification.

Appeal from the decision of the Supreme Court of New Brunswick, reported ante, page 524, where the facts are stated.

Held, affirming the judgment of the Court below, Henry and Taschereau, J.J., disenting, that as the conviction was good on its face, it was a

justification for the respondents, until set aside, for anything done under it.

Held, also, that, upon the facts disclosed, A. and B. were "absent" within the meaning of sec. 105 of the Canada Temperance Act, 1878.

Weldon, Q.C., for the appellants.

A. S. White, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. C. YORK.] [23RD DECEMBER, 1885.

McCONNELL v. WILKINS.

Promissory note—Partnership—Holding out as partner—O. J. Act, rules 321, 490.

The firm of W. F. L. & Co., trading in Montreal, desired to open a branch house in the same city in another name for the purpose of securing, in the same line of business, a new class of customers, and thereupon entered into an agreement in writing with one J. H. W. that he should be their agent and manager in conducting the new business, and should receive a proportion of the profits thereof as his remuneration, and share in their losses in the branch business; but that he should not be considered a partner, nor the business be, or be considered a partnership business; and that the proposed business should be carried on in the name of J. H. W. & Co.

Subsequently, J. H. W., when in Toronto, applied personally to the plaintiff (who had had no previous dealings with J. H. W., and did not know of what members the firm consisted) for a loan of money, offering a promissory note, signed by J. H. W. in the firm name of J. H. W. & Co. In answer to the plaintiff's enquiries, J. H. W. explained that certain Quebec customers of the firm had permitted their acceptances to go to protest, and had telegraphed J. H. W. to protect them, and retire their dishonoured paper; and that he, J. H. W., did not want the house to know that these customers had not protected their acceptances, and hence required the money.

In answer to questions put by the learned judge at the trial, the jury found that the firm by their mode of dealing had held J. H. W. out to the public as a partner; that J. H. W. had represented to the plaintiff that he desired to borrow the money for purposes of the firm; that J. H. W. had ostensible authority conferred upon him by the firm to sign the name

of the firm to notes in business transactions for and on account of the firm; and that the circumstances of applying for the loan were not such that the plaintiff should have made further enquiries before advancing the money. Upon these answers the learned Judge of the County Court entered judgment for the plaintiff; but, upon motion in term to set aside the verdict, entered a nonsuit upon the ground that the money was not borrowed in a *bona fide* business transaction, and that the statements of J. H. W. to the plaintiff that he did not desire the firm to know the reason for borrowing the money should have put the plaintiff on his guard, and required the plaintiff to make further enquiry of the members of the firm before advancing the money.

Acting under rule 321, O. J. A., the learned Judge refused a new trial, and entered the nonsuit, with costs to the defendants of the trial, and of the motion in term. Upon appeal to this Court,

Held, (i) that, assuming that the defendants were partners of J. H. W., and liable upon his transactions within the ordinary scope of the firm business, this was not such a transaction, and the representations of J. H. W. were such as to rebut any implication of authority to bind the firm, even if they did not amount to notice to the plaintiff that J. H. W. was perpetrating a fraud upon the firm; and (ii) that the learned judge was justified in refusing a new trial, acting under rules 321 and 490, O. J. A. Appeal dismissed with costs.

Falconbridge, Q.C., for the appellant.
Reeve, Q.C., for the respondents.

C. C. DUFFERIN.] [23RD DECEMBER, 1885.

PETTIGREW v. THOMAS.

Interpleader—Trial of issue by jury—Evidence for the jury.

Under an execution issued on a judgment recovered by one T. against S. B. S., a married woman, wife of one J. J. S., the sheriff seized a certain mare as the property of the judgment debtor. Upon claim made by the plaintiff, an interpleader order issued directing the trial of an issue in the usual form by a jury in the County Court. Upon the trial, the learned judge held that the plaintiff had failed to make out his title by any evidence proper for the consideration of a jury, and he accordingly withdrew the case from them, and directed judgment for the defendant. He also subsequently refused an order *nisi* for a new trial, and this appeal was brought from his judgment.

It appeared that the plaintiff claimed title to the mare under a purchase from J. J. S., or his wife, for valuable consideration actually paid. There was no bill of sale, but the plaintiff put in evidence to prove that there was an immediate delivery followed by an actual and continued change of possession sufficient to satisfy the statute.

Held, that the question of delivery and change of possession is one proper to be submitted to the jury with proper explanations by the judge as to the object of the statute and the meaning of terms contained therein, and that the case should not have been withdrawn.

Scribner v. *McLaren*, 2 Ont. R. 265, approved.

S. H. Blake, Q.C., and *Elgin Myers*, for the appellant.

Moss, Q.C., for the respondent.

C. C. ELGIN.] [23RD DECEMBER, 1885.

CHING v. JEFFERY.

Promissory note—Equity affecting transferee taking subsequent to maturity.

Action upon a promissory note made by defendant, payable to one W. G. A. or bearer, and transferred by W. G. A. to the plaintiff several months after it became due. The defence was that after maturity of the note, and while W. G. A. was still the holder, it was agreed between defendant and W. G. A., and one R. J. (who was also interested in the note), that the defendant should supply W. G. A. and R. J. and their families with board and lodging, the value of which should be applied in payment or reduction of the note. The rate at which such board and lodging should be supplied was not agreed on, nor did it appear that there had been any subsequent accounting together, or settlement of the amount by the parties. The jury found the fact of such agreement, and that the amount due under it was $100; also that the plaintiff was a *bona fide* holder of the note for value, and without notice. The board, etc., had been supplied before the plaintiff became the holder. The learned judge of the County Court held that this was merely the subject of a set off, which might have been pleaded if W. G. A. were plaintiff, and that "the defence set up did not affect the equities, if any, which subsisted between the original parties to the note arising out of the transactions in which it was given."

Upon appeal to this Court,

Held, that W. G. A.'s title to dispose of the note after its maturity became subject by the agreement to the defendant's right to have the amount due for board, etc., applied in reduction of the note in accordance with the agreement, and that such right was an equity attaching to the note in the plaintiff's hands. *Canadian Bank of Commerce* v. *Ross*, 22 U. C. C. P. 491, distinguished, and judgment reversed.

Ermatinger, Q.C., for the appellants.

Aylesworth, for the respondents.

PROUDFOOT, J.] [23RD DECEMBER, 1885.

McVEAN v. TIFFIN.

Mechanics' lien—Mortgage—Priority of registered mortgage over lien subsequently registered.

This was an action under the Mechanics' Lien Act, R. S. O. cap. 120, brought by the contractor against the owner to enforce a lien. By the judgment, a reference was directed to the Local Master at Chatham in the usual form, to enquire whether any person or persons, and who other than the plaintiffs, except prior mortgagees, had any encumbrance, etc., upon the premises in question. Subsequently the Master made a number of persons, including the appellants, parties in his office, and caused them to be served with a notice T, which notice, however, wrongly recited the judgment as directing an enquiry as to encumbrances generally, without the exception as to prior mortgages. Upon being served, the appellants petitioned to discharge the Master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action.

It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though not all of it before the plaintiffs had done work and supplied materials. The plaintiffs contended for priority to the mortgagees as far as regarded advances made after the commencement of the work. The plaintiffs did not, however, allege that the mortgagees had any actual notice of their lien before it was registered. The learned judge in the Court below dismissed with costs the petition of the appellants, on the ground that it was proper for the Master, under the judgment, to enquire as to moneys advanced upon the mortgage subsequent to the commencement of the work in respect of which the lien arose.

Held, that the appellants' claim was prior to that of the plaintiffs, and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the Master justified in entering upon any enquiry as to their advances. *Richards* v. *Chamberlain*, 25 Gr. 402, and *Hynes* v. *Smith*, 27 Gr. 150, referred to. Appeal allowed.

Bayley, Q.C., for the appellants.

Clement, for the respondents, plaintiffs.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[BOYD, C., 2ND DECEMBER, 1885.
[ROSE, J., 5TH DECEMBER, 1885.

CONMEE v. CANADIAN PACIFIC RAILWAY CO. CANADIAN PACIFIC RAILWAY CO. v. CONMEE.

Jury notice — Cause of action—Cancellation of certificates—Injunction—Reference—Complicated questions—Burden of proof—Vexatious action—Cross action—Counter claim—Staying proceedings.

C. & M. were contractors for building the Canadian Pacific Railway, and sued the Company for $200,000, the balance alleged to be due upon their contract, the writ in their action having issued on the 5th October, 1885, in the Queen's Bench Division. On the 31st October, 1885, the Railway Company began an action in the Chancery Division against C. & M. to recover $600,000 alleged to have been overpaid them, setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of these certificates, and an injunction to restrain the contractors from receiving a final certificate. The Company did not counter-claim in the action brought by C. & M.

Held, that the action of the Company was one which would have been begun, as of course, by a bill filed in Chancery, when that was a distinct Court, although it might have been possible to recover in a Common Law forum, if the action had been otherwise framed; it was also a case in which it was to be expected that a reference to take the accounts would be directed at some stage, and that difficult and complicated questions of law and fact would arise at the trial which could be much better dealt with by a judge than a jury; and the jury notice given by C. & M. was therefore struck out.

Held, also, that, as there was a large burden of proof upon the Company, and no vexation or impropriety in their seeking to unravel the alleged fraudulent transactions, and as they were not advancing a counter-claim in the action brought by C. & M., the Company's action should not be stayed till the final determination of the other action; but that the trial of the Company's action was the proper preliminary step in endeavouring to adjust the rights of the parties, and should take place first.

Taylor v. *Bradford*, 9 P. R. 350, distinguished.

McCarthy, *Q.C.*, *Osler*, *Q.C.*, and *Wallace Nesbitt*, for C. & M.

Robinson, *Q.C.*, *Moss*, *Q.C.*, and *R. M. Wells*, for the Company.

[An appeal to the Court of Appeal is pending.]

[THE DIVISIONAL COURT, 2ND DECEMBER, 1885.

COCHRANE MANUFACTURING CO. v. LAMON.

Capias—Judgment—Special bail—Appearance—Statement of claim.

The plaintiffs issued a writ of capias which was irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which, by its recognizance, meant an undertaking by sureties pay the condemnation money in which the defendant "shall be condemned on this action." The claim endorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in.

Held, that the defendant and his sureties had, by putting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action; and a statement of claim delivered after appearance was therefore regular.

Semble, that sec. 34 of the C. L. P. Act has not been repealed by rule 5, O. J. A.

Aylesworth, for the plaintiffs.
Shepley, for the defendant.

[O'CONNOR, J., 18TH DECEMBER, 1885.

In re THE PEOPLE'S MILLING COMPANY AND THE TOWN OF MEAFORD.

Municipal by-law—Powers of Municipal Council—Consolidated Municipal Act, 1883, sec. 368.

On 16th February, 1885, C. applied to the Corporation of the Town of Meaford for a lease of a certain lot of land owned by the Corporation, alleging that he and others proposed to erect thereon a mill and other buildings for the purpose of carrying on the business of a flour and grist mill and a general grain business; they petitioned also for exemption from taxation upon the mill for ten years. Under by-law passed the 4th March, 1885, a lease to the applicants was executed by the mayor, on behalf of the Corporation, of the lot in question for twenty-one years, reserving a nominal rent, and containing covenants on the part of the lessees in reference to the nature of the buildings to be erected, to pay taxes, and other provisions. Another by-law was subsequently passed exempting the "manufacturing establishment of C. and others (naming them), established for the purpose of carrying on the milling and grain merchant business, including the lands leased, etc., and the mill and all buildings and property to be erected and placed upon the said land for

the purpose of the said business," subject to the performance by the lessees of the stipulations in the lease as to maintaining and working the mill. Upon the faith of this by-law and lease, C. and others, the lessees, purchased a large amount of material, and entered into building contracts for the purpose of erecting the proposed mill, and proceeded to erect the same, and further contracted for the purchase of machinery, the whole involving an outlay, as was alleged, of some $17,000. Upon the 20th July following, the Council by by-law repealed the by-law exempting from taxation.

Upon an application by C. and others, the lessees, to make absolute an order *nisi* to quash the repealing by-law, upon the ground that the same was a fraud upon the applicants and a breach of contract, it appeared that there were other taxpayers of the same town engaged in the same business and having large amounts of capital invested therein, whose interests were injuriously affected by the repealed by-law.

Held, (i) that inasmuch as the applicants were treated in the lease and by-law as carrying on two distinct kinds of business, viz., the milling business and the general grain business, the first only of which the Council had power to exempt from taxation, the by-law exempting from taxation was bad; (ii) that the by-law was also bad in exempting all the land leased, and not the mill only, from taxation, as other buildings suitable alone for the grain business might be erected thereon; (iii) the fact that other large milling establishments within the same municipality were discriminated against also made the by-law illegal and bad; (iv) the repealed by-law being therefore illegal, the Council had a right to repeal, or go through the form of repealing it, in order to prevent trouble and expense. The order *nisi* was therefore discharged with costs.

Lash, *Q. C.*, for the motion.
Aylesworth, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 19TH DECEMBER, 1885.

FRYE v. MILLIGAN.

Hire contract—False representation—Deceit—Breach of warranty—Damages.

The defendant delivered a piano to the plaintiff on what is known as a hire contract, which provided that the defendant did "neither part with the said piano," nor did the plaintiff "acquire any title" to it, until a note for $400, which was given for the price, was fully paid, and that on default of payment of the note or any of the instalments, the defendant was authorized to enter the plaintiff's premises and take and remove the piano, and collect all reasonable charges for its use. The price of the piano was $500, which was payable by crediting $100 on an old piano taken in exchange and the balance in monthly instalments, the note

being payable by like instalments. The note was discounted by a private banker, the defendants endorsing it. The instalments were not met as they fell due, and payment was enforced, and when action was brought there were instalments in arrear.

The plaintiff sued for fraudulent misrepresentation, and for general damages for breach of an implied warranty; the alleged misrepresentations or warranties being that the piano was worth $500, that it was a first-class instrument, and as good as any Steinway or Chickering piano.

Held, that the plaintiff could not succeed as to the false representation, for the evidence showed that after she discovered the piano was not as was represented she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting. Nor could she recover in an action for deceit, for she failed to show that the defendant did not believe the statements made to be true, or that the statements were made recklessly; also, no damages were shown; and moreover, though not deciding the point, the statements were such as are properly styled simple commendations.

Held, also, that as the property had not passed, an action for the breach of warranty would not lie.

Falconbridge, Q.C., for the plaintiff.

Meredith, Q.C., for the defendant.

[THE DIVISIONAL COURT.

LYTTLE v. BRODIE.

Assessment and taxes—Sale for taxes—Two years—Validating sale—R. S. O. cap. 180, sec. 156.

Held, following *Hutchinson* v. *Collier*, 27 U. C. C. P. 254, that the two years referred to in sec. 156 of R. S. O. cap. 180, after the lapse of which a tax deed is to be valid, runs from the giving of the deed, and not from the sale.

Cameron, C. J., and Rose, J., though not satisfied with that decision, considered they were bound by it.

Alex. Millar, for the plaintiff.

A. H. Macdonald, for the defendant.

[THE DIVISIONAL COURT, 19TH DECEMBER, 1885.

CLARKSON v. SNIDER.

Stock—Pledge by broker—Recovery of purchase value.

On 28th February, 1884, and 1st May, 1884, respectively, a firm of brokers were employed by defendant to purchase ten several shares of Federal Bank stock, at their respective rates of $138.25 and $126, with ¼ per cent. commission. The price paid by the brokers was to be repaid

on demand, with interest at six per cent., and the stock held by the brokers as collateral security for repayment; the brokers also receiving a ten per cent. margin. The brokers took the stock in their own names, and then transferred it to a loan company, together with other stock of the same character, the transfer, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made on him from time to time as the stock fell. On 27th June, 1884, the brokers suspended payment, at which date the stock had fallen to 82, or 18 below par; and on 26th December they made an assignment to the plaintiff for the benefit of creditors. Neither at the time of the suspension or assignment was any unpledged or unhypothecated stock held for or held by the brokers, nor was any transferred to the plaintiff. There was only the right vested in plaintiff to redeem any stock that might have remained undisposed of by the pledgees. On 4th August, 1885, after the stock had by legislative enactment been reduced to one half its original par value, or from $100 to $50, the plaintiff offered to transfer twenty shares of the reduced stock, which defendant refused to accept. The plaintiff then brought an action against the defendant to recover the alleged balance due on the stock.

Held, there could be no recovery.

When in a jury case the learned judge at the trial enters a nonsuit, a notice of motion and order *nisi* is the proper mode of moving against the nonsuit.

F. Arnoldi, for the plaintiff.
Fullerton, and *Cook*, for the defendant.

[THE DIVISIONAL COURT, 19TH DECEMBER, 1885.

UDY v. STEWART.

Seduction—Survival of action—Evidence, admissibility of—O. J. Act, Rule 383.

In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order *nisi* was obtained to set aside the verdict and judgment, and to enter judgment for the defendant on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for argument, it appeared that after the order had been served the plaintiff had died.

Semble, that, under O. J. A., rule 383, the action abated by reason of the death of the plaintiff; but

Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the

nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence, and without her evidence the verdict could not be supported.

Under the circumstances, an order was granted staying further proceedings in the action.

G. T. Blackstock, for the plaintiff.

Osler, Q.C., and *Barron*, for the defendant.

REGINA v. BENT.

Criminal law—Evidence—Admissibility.

The prisoner was indicted along with W., the first count charging W. with forging a circular note of the National Bank of Scotland, and the second with uttering it knowing it to be forged. The prisoner was charged with being an accessory before the fact. Evidence was admitted showing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes; that these notes were printed from the same plate as those uttered by W.; that the prisoner was in Montreal with F., they having arrived and registered their names there together at the same hotel, and occupied adjoining rooms. At the trial in Montreal, after F. and H. had been convicted on one charge, they admitted their guilt on several others. It was also proved that a number of these circular notes were found on F., and a number on H., and these latter were produced on the trial of the prisoner.

Held, that the evidence was properly received in proof of the guilty knowledge of the prisoner.

MacMahon, Q.C., for the Crown.

Bigelow, for the defendant.

REGINA v. McDONALD.

Criminal law—Separate indictments for similar offences—On trial of one of the indictments evidence received of charge on the other—Admissibility.

Two indictments were preferred against the defendant for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendant was put on his trial on the charge of destroying M.'s trees; and evidence relating to the offence charged in the other indictment was admitted as showing that the offences had been committed by the same person.

Held, that the evidence was properly received.

Johnston, Deputy Attorney-General, for the Crown.

G. T. Blackstock, for the defendants.

FRIENDLY v. CANADA TRANSIT CO.

Sale of goods—Consignor and consignee—Property passing—Right of action.

L. gave a verbal order to the plaintiffs for certain goods exceeding in amount $400, which were shipped on defendant's steamer. The goods were insured by the plaintiffs, loss, if any, payable to them. The vessel arrived, and there being no wharf, a sort of gangway was constructed by means of which the cargo was discharged. One of the cases was duly landed and received by L., one slipped from the gangway into the water and was damaged, while the third remained on board in consequence of the purser requiring payment of the freight not only on these cases but on a variety of other goods consigned to L. before he would deliver it up, while L. refused to pay unless he had an opportunity of checking over the goods. Before the dispute was settled the steamer left, and, a few days afterwards, was lost with this case of goods.

Held, GALT, J., dissenting, that the property in these cases of goods had passed to the consignee L., and that the plaintiffs could not maintain an action for the loss and damage done to the goods.

D. E. Thomson, for the plaintiffs.

Tilt, Q.C., for the defendants.

McCANN v. PRENEVEAU.

Malicious prosecution—Termination of criminal proceedings—Original indictment—Admissibility of—Slander, evidence of—Amendment.

Action for malicious prosecution and slander. The malicious prosecution arose out of an indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill."

Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced.

Held, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate is properly receivable, and should not have been rejected, as was done here.

There was no evidence to sustain the slander as laid, but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made by defendant was that he should be allowed to examine the witnesses again on the new count. An objection in term to the amendment was, therefore, not allowed.

The evidence in support of the amended count consisted, not of statements voluntarily made by the defendant, but of answers to questions put to him after he had laid a charge against the plaintiff as to what the charge was.

Held, that this would not be sufficient to base an action of slander; and, moreover, the evidence itself failed to substantiate the slander.

G. T. Blackstock, for the plaintiff.
Osler, Q.C., for the defendant.

HILLIARD v. GEMMELL.

Landlord and tenant—Tenant holding over after expiration of term—Rent payable therefor.

Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent.

In this case the evidence showed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration of their term, and made no demand for an increased rental; and he was therefore held to have agreed to allow defendants to remain on on the terms of paying the rent reserved by the expired lease, but as they received notice that, if they desired to remain on longer, they must pay an increased rental, they were held chargeable with such increased rental.

Dumble, for the plaintiff.
Edmonson, and *Wallace Nesbitt*, for the defendants.

[WILSON, C. J., OCTOBER 20TH, 1885.

ALEXANDER v. SCHOOL TRUSTEES OF GLOUCESTER.

Party and party costs—Taxation—Items of bill.

Upon appeal from the taxation of the plaintiff's costs of the action, as against the defendants, by the Deputy-Clerk of the Crown at Ottawa,

Held, (1) a fee for settling the plaintiff's reply to counter claim should have been allowed.

(2) The costs of a *similiter* with jury notice were properly disallowed, as the notice might have been served with the reply.

(3) Instructions for examination of the plaintiff at the instance of defendants for discovery, $2 should have been allowed.

(4) Instructions for examination of the defendant by the plaintiff, $2 should have been allowed.

(5) Attendances to bespeak copies of depositions on examinations for discovery should have been allowed.

(6) The plaintiff was not bound to rely upon admissions of the defendants in their examination for discovery, and therefore should have been allowed the costs of subpœnaing a witness to prove a fact so admitted.

(7) A fee for attending to hear judgment on a day fixed for delivering judgment when judgment was further deferred, should have been allowed.

(8) The discretion of the taxing officer as to counsel fees at the trial should not be interfered with.

(9) Where the judge at the trial directed the plaintiff to put in, in writing, before judgment, his reasons why it should be in his favour, charges for drawing, engrossing, and settling such reasons should have been allowed.

(10) A telegram to defendants' solicitors advising the result of judgment sent by direction of the judge, should have been allowed.

(11) Instructions for an ordinary affidavit of disbursements were properly disallowed.

(12) It is necessary where there is no peremptory list, to keep witnesses in attendance from the first day of the assizes until the case is reached, and therefore witness fees for 14 days' attendance should have been allowed.

Holman, for the appeal.
Allan Cassels, contra.

McDONELL v. BUILDING AND LOAN ASSOCIATION.

Mortgage—Demise clause—Non-execution of mortgage by mortgagee—Death of mortgagor—Right to distrain—Distraining for one thing, justifying for another.

A mortgage of certain land, made 17th November, 1881, by the plaintiff's father to the defendants, for the term of seven years, the principal and interest repayable by instalments on 1st November in each year, contained a demise for the term of the mortgage at a rental equal to the amount of the instalments of principal and interest falling due at the same time. The mortgagor was to remain in possession until default. The mortgage was not executed by the mortgagees. The mortgagor remained in possession and paid the instalments of principal and interest falling due the 1st November, 1882 and 1883. He died intestate in December, 1884, and by an arrangement made between the plaintfff, a son, and the other heirs-at-law, and the widow, the plaintiff occupied the land. At the father's death there was due, for principal, $100, and interest $147. The interest was subsequently paid by plaintiff. In October, 1885, after the interest had been so paid, the defendants executed a distress warrant, addressed to the bailiff, directing him to levy $112 55, "the amount of interest due on the 1st November, 1884;" under which the bailiff distrained the plaintiff's goods.

Held, that, by reason of the provisions of the mortgage, the mortgagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor.

Held, also, that, notwithstanding that the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor.

Moss, *Q.C.*, for the plaintiff.
Allan Cassels, for the defendants.

[O'Connor, J., 18th December, 1885.

McLEAN v. HAMILTON STREET RAILWAY CO.

Excluding counterclaim—Diverse causes of action.

Held, that it would be extremely inconvenient and inexpedient to try in one suit two causes of action in tort, each of which depends on nice distinctions of law and fact, and in one of which the judge decides the law and the jury the fact, while in the other the jury are judges of both law and fact; and a counterclaim for libel in an action for negligence was therefore excluded.

Aylesworth, for the plaintiff.

E. E. Kittson, for the defendants.

REGINA v. REGAN.

Canada Temperance Act, 1878—32 & 33 Vict. cap. 30. (D)—Summons—Non-personal services—Proceeding ex parte—Quashing conviction—Improper conduct of defendant—Costs.

For the offence of selling liquor contrary to the provisions of the "Canada Temperance Act, 1878," a summons was issued under 32 & 33 Vict. cap. 31 (D), made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded *ex parte*, and convicted him;

Held, that the conviction must be quashed; but, as it appeared that the defendant had attempted to tamper with the informant, without costs.

[Wilson, C.J.

GRAHAM v. LANG.

Landlord and tenant—Forfeiture of term and rent due on assignment—Distress.

The defendant made a lease under seal to R., dated 8th November, 1884, for five years from 12th November, at the rent of $400, payable half-yearly in advance on the 12th November and May in each year. The lease contained a covenant that "if the lessee shall make any assignment for the benefit of creditors * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half-year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May the defendant, claiming to do so under the above covenant, distrained for the half-year's rent which, in the regular course of time, would have been payable in advance on 12th May.

Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed as rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant which was binding on the tenant was equally binding on the plaintiff as his assignee.

Marsh, for the plaintiff.

Watson, for the defendant.

[CAMERON, C.J.

BICKFORD v. CHATHAM.

Railways—Bonus—Trustees, necessity for—By-law, compliance with conditions of—Separate agreement—necessity to comply before issue of debentures—Action for damages—R.S.O. cap. 174, sec. 559, sub-sec. 4—36 Vict., cap. 70 (O), construction of.

Under a by-law to grant aid by way of bonus by the issue of debentures to a railway company, no issue or delivery thereof was to take place until certain conditions and stipulations contained in the by-law were performed, amongst others, the completion of the road, and obtaining the certificate of the Government Engineer. By agreement entered into before the final passing of the by-law, the company covenanted to perform certain of their acts, amongst which was the location of a station "at or near" the corner of certain named streets.

By the Municipal Act, R.S.O. cap. 174, section 559, sub-section 4, authority is given to grant bonuses and issue debentures in aid of a railway company, payable at such times, etc., as the municipal council may think meet. By the defendant's special Act of Incorporation, 36 Vict. cap. 70 (O), the debentures were to be issued within six months after the passing of the by-law to the trustees, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank, and pay the same out on the certificate of the chief engineer of the railway company.

Held, on the evidence, that the station, though not located at the corner of said streets, was not so far therefrom as to prevent its location being, by reasonable intendment, within the meaning of the word "near;" at all events, non-compliance with terms of the agreement not covered by the conditions, etc., of the by-law would not prevent the accruing of the plaintiff's title to the debentures; but that the defendant's remedy must be for damages for breach of covenant.

Held, also, that a compliance with the terms of the general Act was sufficient, for that the provisions of the special Act were not restrictive, but enabling, and enlarging the powers under the general Act; and that under the circumstances the appointment of trustees would have been useless.

S. H. Blake, Q.C., and *Lash, Q.C.*, for the plaintiff.

Robinson, Q.C., and *Matthew Wilson*, for the defendant.

CHANCERY DIVISION.

[BOYD, C.

ELIZABETHTOWN v. BROCKVILLE.

Public Health Act, 1882—Small-pox Hospital—Adjoining municipalities—45 Vict. cap. 29.

Held, on a motion for interim injunction, that under 45 Vict. cap. 29, sec. 12, no hospital can be placed by one municipality within the limits of another municipality without first obtaining the consent of the latter to that step, and an injunction must go restraining the defendants from using a certain building rented by them within the plaintiffs' municipality as a small-pox hospital.

H. J. Scott, Q.C., for the plaintiffs.

C. Moss, Q.C., and *Edmund Reynolds*, for the defendants.

[PROUDFOOT, J., 18TH NOVEMBER, 1885.

SCHRADER v. LILLIS.

Agreement—Cigar Makers' Union—Consideration—Restraint of trade—Penalty—Liquidated damages.

An agreement dated May 27th, 1885, made by certain members of a cigar manufacturers association, after reciting that it had been agreed that they "should become severally bound to one Schrader, in the sum of $500 as liquidated and ascertained damages in case any of them shall at any time during the continuance of this agreement either directly or indirectly buy or sell any cigars, marked or branded with the labels of the Cigar Makers' Union, or shall use or allow to be used in connection with the manufacture of cigars by him any Cigar Makers' Union label, or any label sanctioned by the Cigar Makers' Union, or any label in any way indicating that his cigars have been manufactured by Union men or shall permit or allow any Cigar Makers' Union or any union or any set of men to compel him to hire or employ union men only, or to dismiss any employee," contained covenants on the part of the members whereby they agreed, each for himself, "that he will, in case he shall at any time hereafter violate any of the foregoing stipulations by buying or selling cigars marked or branded with the labels of the Cigar Makers' Union, etc." (as in above recital), "immediately pay to the said Schrader the sum of $500, the intention being that in case of a violation of all or any of the stipulations, provisions or conditions aforesaid by any of" them "he the said party so offending shall immediately forfeit and pay to the said Schrader the full sum of $500 because of his so offending as liquidated and ascertained damages (and not as a penalty) * * the intention also being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever of any of the stipulations, provisions or conditions aforesaid on the part of any one of the said" (covenanting parties).

Held, (i) that the mutual obligations imposed by the contract constituted a sufficient consideration.

(ii) that the agreement was not invalid as in restraint of trade, or as contrary to public policy.

(iii) that the plaintiff was entitled to recover the sum named in the agreement as liquidated damages.

McCarthy, Q.C., and *Muir*, for the plaintiffs.

S. H. Blake, Q,C., for the defendants.

[THE DIVISIONAL COURT, 3RD DECEMBER, 1885.

SMITH v. GREEY.

Patent action—Particulars—35 Vict. cap. 26, sec. 24 (D).

In an action for infringement of a patent, the defendants denied (i) the novelty of the invention, and (ii) that the plaintiff was the first and true inventor.

PROUDFOOT, J., ordered the defendants to deliver particulars under these defences, stating in what respects the defendants denied that the plaintiff's patent was for any new machine, etc., and the dates and occasions when, and the places where, the prior user of the said invention, or any material part thereof, took place, and the names of the persons by whom the prior user was had.

On appeal from this order, the Divisional Court (Boyd, C., and Ferguson, J.) was divided in opinion, and the order was therefore affirmed.

Per BOYD, C. In the absence of any legislation or rules of Court upon the subject, the judge has no power or right to prescribe so minutely what shall be disclosed in the particulars. There has been no change in the practice at law since *Mills* v. *Scott*, 5 U. C. R. 360, and there is no settled practice in equity, where it is quite a recent innovation to apply for particulars. The statute 35 Vict. cap. 26, sec. 24. (D), goes no further than to justify such general order for particulars as is usual in other cases.

Per FERGUSON, J.—The decision in *Mills* v. *Scott* was rendered while 7 Geo. IV cap. 5 was in force, which statute did not contain any provisions regarding particulars, and the orders in that case were made under the general practice of the Court, but the statute 35 Vict. cap. 26, sec. 24 (D), gives general power to make such order as may seem fit respecting the proceedings in the action; the delivery of particulars is a proceeding, and there was therefore jurisdiction to make the order.

The order was a reasonable one, and not too comprehensive in its terms, and should therefore be affirmed.

F. R. Powell, for the appellants.

Mervyn Mackenzie, contra.

[PROUDFOOT, J., 1ST DECEMBER, 1885.

McELHERAN v. LONDON MASONIC MUTUAL BENEFIT ASSOCIATION.

Adverse claims—Right to interplead—Summary application—Chancery practice—Sec. 17, sub-sec. 6, and Rule 2, O. J. A—Payment into Court—Costs—Indemnity—Staying action.

The plaintiff and J. P. both claimed from the defendants payment of the moneys due under a certain certificate of membership, issued by the defendants to T. P. deceased, the plaintiff claiming as administrator of T. P. and J. P. claiming that the certificate had been indorsed to her by the deceased. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and, upon this action being brought, applied for an interpleader order in respect of the adverse claims. J. P. did not appear in answer to the application, and her claim was barred.

Held, that there was a right to interplead upon summary application either under sec. 17, sub-sec. 6, O. J. A., or under the former practice of the Court of Chancery. Rule 2, O. J. A., does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill.

Held, also, that the defendants were entitled to their costs of the action and of the application, and to retain them out of the funds in their hands, and that the balance should be paid to the plaintiff instead of into Court, as the other claimant had withdrawn, upon the plaintiff indemnifying the defendants against the production of the original certificate, and that the action should be stayed.

Shepley, for the plaintiff.

A. H. Marsh, for the defendants.

[BOYD, C., 21ST DECEMBER, 1885.

PEEL v. PEEL.

Scale of costs—Surrogate Court—Case transferred to High Court.

In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the Rules of 1858, *i.e.*, as nearly as possible on the County Court scale.

Re Harris, 24 Gr. 459, and *Re Osler*, 24 Gr. 529, explained and followed.

Hoyles, for the plaintiff.

R. M. Meredith, for the defendant.

[FERGUSON, J., 3RD DECEMBER, 1885.

KEAYS v. EMARD.

Mortgage—Subsequent parol agreement varying same—Short form deed—Covenant for quiet possession.

An action on a mortgage given to secure a balance of the purchase money for the land purchased from the plaintiff, the first instalment of which was overdue and unpaid.

The defendant set up that he only accepted the deed from the plaintiff and executed the mortgage sued on, upon the plaintiff promising to give him possession at a named date, because he relied on representations of the plaintiff made to him that no one else was in possession of, or had any claim to the land, and that the plaintiff could give him possession at any time; whereas, in fact, as the plaintiff knew, one L. was in possession, and claimed a right to be so; and the plaintiff was unable to give up possession at the time named, and when, after accepting the deed and giving the mortgage, the defendant threatened the plaintiff with proceedings to recover possession and damages for breach of the agreement, and for the false representations aforesaid, the plaintiff agreed that in consideration of the defendant forbearing to take such proceedings for a reasonable time, no instalment should be due under the mortgage until such time after the time named therein, as equalled the time beyond the time originally fixed for delivery of possession, until possession should be actually delivered to the defendant; and that they should pay defendant such damages as he should sustain from non-delivery of possession at the proper date. The defendant further set up that he forebore proceedings accordingly, and that possession was not delivered till such a date that by virtue of the above transaction, nothing would be due under the mortgage till January, 1886.

The defendant having proved the truth of these allegations:

Held, that, as to the parol agreement to deliver possession by a named date, this being a collateral agreement, and made in consideration that the defendant would enter into the transaction as he did, would, according to the statement of the law by *Mellish*, L. J., in *Erskine* v. *Adeane*, L. R. 8 Ch. at p. 766, have been a binding agreement, notwithstanding the execution of the deed and mortgage, were it not that the conveyance to the defendant containing the ordinary short form covenant for quiet possession; the parol agreement was contradictory to the meaning of this, as shewn by column in the statute containing the extended form of the covenant. Or if not contradictory, added another term to the deed, and this was fatal to giving effect to the parol agreement.

Held, however, that the forbearance to sue, since the defendant bona fide believed he had a good cause of action for the false representations, and the breach of the agreement, formed a good consideration for the parol

agreement to postpone payments under the mortgage; and the plaintiff was bound by it; and nothing, therefore, being due to the plaintiff, the action must be dismissed.

O'Gara, Q.C., for the plaintiff.

J. J. Gormully, and *F. Macdougall*, for the defendants.

[FERGUSON, J., 14TH DECEMBER, 1885.

BOGART v. TOWNSHIP OF SEYMOUR.

Medical practitioner—Compensation for services—By-law appointing—Absence of fixed salary—Local Board of Health—47 Vict. cap. 38, sec. 20 (O).

An action for compensation for medical services rendered upon the order of the Local Board of Health of the defendants the township.

It appeared that the plaintiff was, by by-law of December, 1884, appointed Medical Health Officer of the township, under 47 Vict. cap. 38, s. 20, but the by-law fixed no salary, as might have been done under that section.

Held, that the law would fix the salary at a reasonable sum, regard being had to the services to be performed and actually performed by the plaintiff, and that the plaintiff was entitled to a reference to the Master to fix the amou .t.

The Local Board of Health had been appointed under by-law of January, 19th, 1885, which named three individuals as the Board. It did not, however, state that they were ratepayers, as required by 47 Vict. cap. 38, s. 12, s. s. 2, nor did it mention the officers, whom the said sub-section makes *ex officio* members of the Board.

Held, that at all events where the question arose, not on a motion to quash the by-law, but incidentally, as here, the by-law should not be held invalid for these reasons.

W. Cassels, Q.C., and *Lynch*, for the plaintiff.

Osler, Q.C., and *Caldwell*, for the defendant.

In the Maritime Court.

THE ATHABASCA.

No. 38. NEELON v. THE C. P. RAILWAY CO.
No. 40. HELLIWELL v. THE C. P. RAILWAY CO.

Towage—Vessel cut in sections—Maritime lien—Agency.

The C. P. R. Company's steamship, the *Athabasca*, was taken from Montreal to Buffalo in sections, being too large to pass through the intervening canals. One D. superintended the towing of these sections as far as Port Dalhousie, and there engaged the plaintiff's tugs to tow them through the Welland Canal at certain specified rates. The towage was properly done, but the defendants refused to pay the plaintiffs the amounts due them under the contracts made by D. on the grounds that he was not the master of the steamship, nor authorized to engage these tugs, and that they could have employed other tugs to do the work for a less sum. The steamship was arrested at the suit of the tug-owners, and released on bail.

On 1st October, 1884, both causes came on for hearing at St. Catharines, before Senkler, S. J., and on the 10th November, judgment was pronounced in favour of the plaintiffs, with costs, on the ground that the evidence shewing the conduct of the parties was sufficient to establish the agency of D.

On appeal to the Supreme Court of Canada, both judgments were affirmed.

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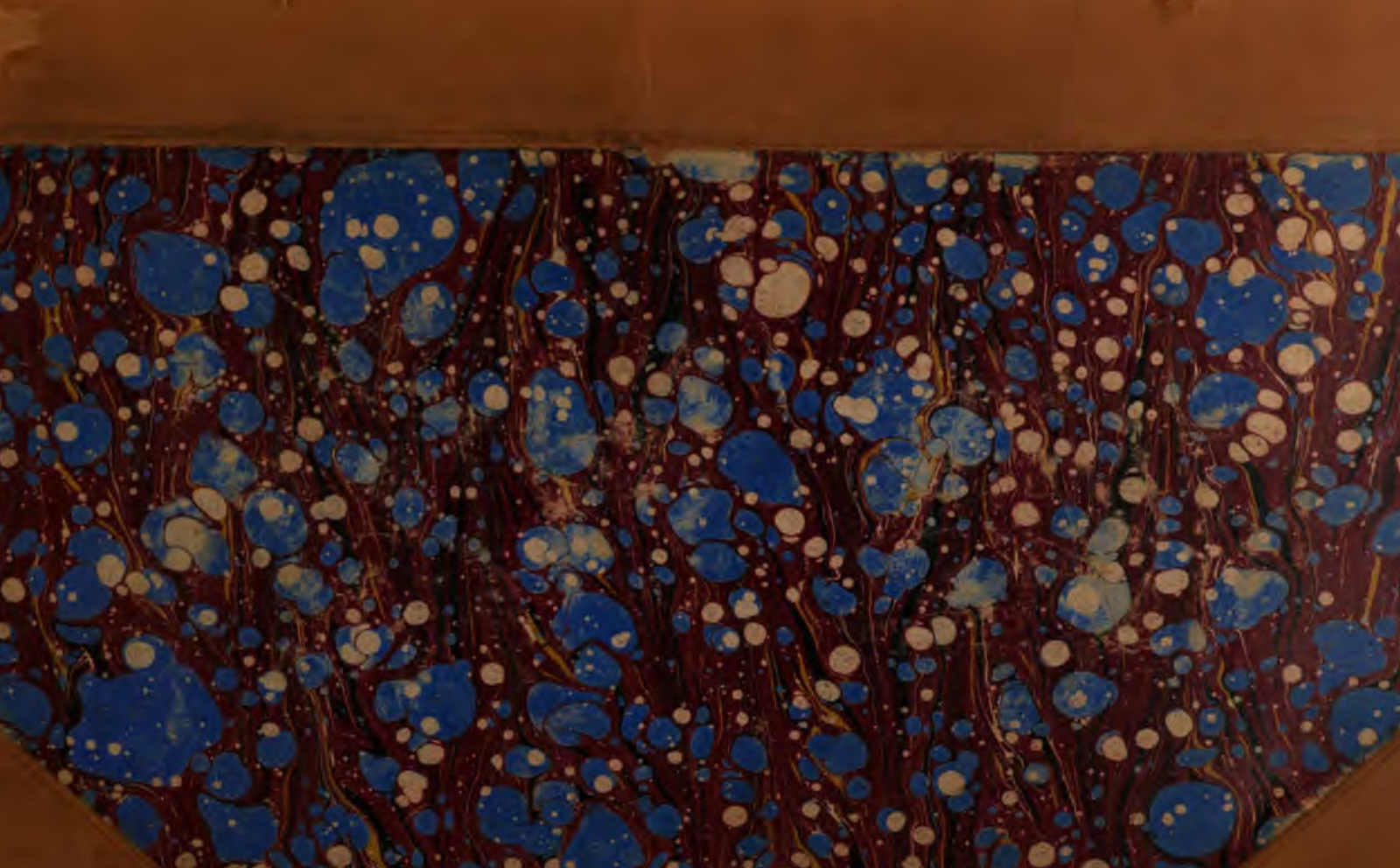
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